Supreme Court, U.S.
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No. 99-463

In The

Supreme Court of the United States

RICHARD SULLIVAN,

Petitioner,

vs.

RIVER VALLEY SCHOOL BOARD, RIVER VALLEY EDUCATION ASSOCIATION, CHARLES O. WILLIAMS, Superintendent River Valley Schools, PHIL BENDER, President of River Valley Education Association, JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

BRIEF OF RESPONDENTS RIVER VALLEY EDUCATION ASSOCIATION AND PHIL BENDER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Michigan court properly apply federal constitutional law in determining that Petitioner's speech regarding his own employment did not involve matters of public concern?

LIST OF PARTIES

The River Valley Education Association is a Michigan non-profit corporation and local labor organization. It is affiliated with the 5-C Education Association, the Michigan Education Association ("MEA"), and the National Education Association ("NEA").

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

COUNTER-STATEMENT OF THE CASE 2

I. THE FACTS 2

II. THE PROCEEDINGS BELOW 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

I. THE DECISIONS OF THE MICHIGAN COURTS WERE CORRECT AS A MATTER OF SUBSTANTIVE FIRST AMENDMENT LAW .. 11

A. Petitioner's Speech Did Not Involve Matters of Public Concern 12

B. The Michigan Courts' Decisions Were Not Contrary to *Chappel v. Montgomery County Fire Protection District No. 1* 14

C. No Adverse Action Was Taken by Respondents Against the Petitioner 16

D. The Activities of Bender and the Association Did Not Constitute Action Taken Under Color of State Law 17

TABLE OF CONTENTS – Continued

Page

II. IN ADDITION TO LACK OF MERIT, A NUMBER OF OTHER REASONS EXIST TO DENY THE PETITION 18

A. Petitioner Has Misrepresented the Facts in His Statement of the Case 18

B. Petitioner's Arguments Are, in Many Cases, Unrelated to His Statement of Questions Presented for Review 19

C. Petitioner Has Failed to Identify any Conflict Between the Circuits on the Issue of Public versus Private Speech 19

CONCLUSION AND RELIEF 21

APPENDIX

Notice of Tenure Charges 1a

Preliminary Decision and Order 12a

Tenure Commission Decision 48a

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 14

Alinovi v. Worcester School Committee, 777 F.2d 776 (1st Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 19

Bausworth v. Hazelwood School District, 986 F.2d 1197 (8th Cir. 1992), *reh'g denied*, (1993) 20

Boring v. Buncombe County Board of Education, ___ U.S. ___, 119 S. Ct. 47, 142 L.Ed.2d 36 (1998) 20

Bunger v. University of Oklahoma, 95 F.3d 987 (10th Cir. 1996) 21

Chappel v. Montgomery County Fire Protection District No. 1, 131 F.3d 564 (6th Cir. 1997).. 9, 14, 15, 16, 17, 22

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) 14

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983)..... 11, 12, 13, 16, 19, 22

Detroit Board of Education v. Parks, 417 Mich. 268 (1983) 14

Ezekowo v. NYC Health and Hospitals Corp., 940 F.2d 775 (1991), *cert. denied*, 502 U.S. 1013 (1991)..... 20

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986)..... 21

Jackson v. Metropolitan Edison Co., 419 U.S. 34, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974)..... 17

TABLE OF AUTHORITIES – Continued

Page

Jibson v. Michigan Education Ass'n, 30 F.3d 723 (6th Cir. 1994) 14

Lehnert v. Ferris Faculty Ass'n, 707 F. Supp. 1490 (W.D. Mich. 1989) 14

Messman v. Helmke, 133 F.3d 1042 (7th Cir. 1998) 17

Mt. Healthy City School District v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) ... 11, 19, 22

Murray v. Gardner, 741 F.3d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) 21

Phares v. Gustafsson, 856 F.2d 1003 (7th Cir. 1988) 20

Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968)..... 11, 16, 19, 22

Rahn v. Drake Center, Inc., 31 F.3d 407 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995)..... 20

Sanguigni v. Pittsburgh Board of Public Education, 968 F.2d 393 (3rd Cir. 1992)..... 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I..... 1, 10, 11, 13

STATUTES

42 U.S.C. § 1983..... 1, 13, 17

42 U.S.C. § 1986..... 9, 17

Mich. Comp. Laws § 423.210..... 14

Mich. Comp. Laws § 423.210(2) 1, 3

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. Rule 14(1)(a) 17, 19

Sup. Ct. R. Rule 14(4) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

1. First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

2. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

3. The Public Employment Relations Act of Michigan (PERA), Mich. Comp. Laws § 423.210(2):

> It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the

amount of dues uniformly required of members of the exclusive bargaining representative.

COUNTER-STATEMENT OF THE CASE

I. THE FACTS.

A critical misstatement of the facts is set forth at the outset of Petitioner's rendition of the "Statement of Facts." Specifically, Petitioner Richard Sullivan ("Sullivan") represents that he was suspended for approximately two years in retaliation for exercising his constitutional right of free speech. (Pet. at 5-6.) Sullivan's state court action was filed in June 1993. As of the date Sullivan filed his Complaint, until the lower state court granted Respondent's final Motion for Summary Disposition on December 13, 1994, Sullivan remained actively employed as a teacher in the River Valley School District. At no time during the 1990-91 through 1993-94 school years, which are the pertinent years to Petitioner's claims, did Sullivan suffer any loss of employment, salary, benefits, or any other privileges of his employment.

Sullivan was suspended for two years as a result of tenure charges filed on April 27, 1995 under the Michigan Tenure Act, because of Sullivan's misconduct and acts of insubordination during the 1994-95 school year. The tenure case was filed after Sullivan's case was decided by the trial court. (Pet. App. at 24a-26a; Resp. App. at 4a.) The preliminary order of the administrative law judge assigned to hear the tenure case was issued on March 4, 1996, finding just cause for a suspension without pay until the beginning of the 1997-98 school year. (Resp.

App. at 47a.) The Michigan State Tenure Commission reviewed the proceedings, modified the administrative law judge's order, and issued an order on May 23, 1996, suspending Sullivan for an additional year, until the beginning of the 1998-99 school year. (Resp. App. at 95a.)

The record shows that this case originated in 1990, when Sullivan was denied a coaching position. Sullivan grieved the matter pursuant to a collective bargaining agreement which existed between the River Valley Education Association ("Association") and the River Valley School Board ("Board"). The grievance was submitted to arbitration, where Sullivan lost. Shortly thereafter, Sullivan withdrew from membership in the Association. (Pet. App. at 10a, 51a.)

Article II of the collective bargaining agreement between the Association and the Board contains an "agency shop" provision, authorized by Section 10(2) of the Public Employment Relations Act (PERA), Mich. Comp. Laws § 423.210. The pertinent section of the collective bargaining agreement states as follows:

> Section 1:
>
> A. The Board agrees that it shall be a condition of employment that all present teachers who are association members as of 6-3-77 and all teachers employed after that date shall, within 60 days after the ratification date of this agreement or 60 days after the commencement of employment, whichever comes later, either:
>
> 1. Sign and deliver to the Board an assignment authorizing deduction of membership dues . . . or,

> 2. Cause to be paid to the Association a representation fee which is a legally permissible amount which does not exceed membership dues of the Association and which is determined in a legally permissible manner. *In the event the representation or membership fee shall not be paid, the Board, upon receiving a written and signed complaint from the Association indicating the teacher has failed to comply with this condition, shall process said complaint to effectuate the termination of the teacher's employment.* Upon receipt of said complaint, the Board shall immediately notify the teacher that his/her *services shall be discontinued at the end of the current school year unless prior to employing a replacement teacher the Board of Education shall receive written notification from the Association and the teacher that the representation or membership dues have been paid in full and said complaint is withdrawn.* . . . The refusal of said teacher to contribute fairly to the cost of negotiation and administration of this and subsequent Agreements is recognized as just and reasonable cause for discharge.

(Pet. App. at 10a, 37a; emphasis added.)

The agency fee collection procedures were timely instituted against Sullivan during the 1991-92 school year. Sullivan responded in a letter dated January 2, 1992, to the Director of the MEA Membership Services Department. In his letter, Sullivan complained about his employment, threatened litigation, and accused the Association of unfair and unequal representation. He asserted that he

had been "screwed" by the Association, challenged his agency fee, requested a copy of the court order permitting collection of the fee, and demanded a response within 30 days. Simultaneously, Sullivan paid for the first portion of his 1991-92 agency fee.

On January 27, 1992, W. Grove Sandrock, the MEA Director of Legal Services, responded to Sullivan's letter. He informed Sullivan that his fee would be placed in escrow pending final determination of the appropriate amount of that fee, and forwarded a copy of the court decision upholding the MEA agency shop fee and collection procedures.

Respondent, Phil Bender ("Bender"), then the President of the Association, made a demand on February 18, 1992, for payment of the remainder of Sullivan's 1991-92 agency fee. Sullivan refused to pay the fee. Thus, the Association filed a complaint requesting the Board to initiate discharge proceedings against him. The Board properly notified Sullivan that termination charges had been filed.

A pre-termination hearing concerning Sullivan was scheduled. A flurry of correspondence ensued between the Association and Sullivan. Although Sullivan admitted in a letter to the Secretary of the Board that he was instructed to send his second payment to Bender at the local Association, he ignored that instruction.

Ultimately, Sullivan paid his fee, although it was paid late and to the wrong party, *i.e.*, to the MEA, not to the Association. When the Association received notice of the

payment, it withdrew its request to the Board for Sullivan's termination. Accordingly, the pre-termination hearing was canceled. (Pet. App. at 10a-11a, 37a.)

On June 22, 1992, Board President Jane Temple read a memorandum at a public Board meeting which allegedly contained disparaging statements concerning Sullivan. (Pet. App. at 11a-12a, 39a-40a.) Sullivan claims that the Association "specifically adopted the statements set forth in the document." (Pet. at 16.) That statement is simply false. Although the claim of "adoption" remains ambiguous, there is no evidence in the record that the Association or its officers suggested that the memorandum be drafted, assisted in its drafting, read it at the public Board meeting, or had anything else to do with it.

During the 1992-93 school year, the events which had transpired during the previous year reoccurred. In November 1992, the regular "agency fee packet" (*i.e.*, notice of rights and related instructions) was timely mailed to all fee payers, including Sullivan. He was given the option to pay a reduced fee, which he accepted under protest. (Pet. App. at 37a-38a.)

The first portion of Sullivan's reduced fee was received as required. On February 16, 1993, Bender sent Sullivan a letter requesting payment of the remainder of the fee. Sullivan was instructed to either pay the balance in a lump sum cash payment to the Association on or before March 3, 1993, or sign and return a payroll deduction form. (Pet. App. at 38a.)

Sullivan again ignored the instructions for payment of his fee. Accordingly, the Association once again filed a

complaint with the Board, seeking Sullivan's discharge. Sullivan was duly notified by the Board of the charges. *Id.*

Sullivan responded to the termination charges in a letter dated April 12, 1993, addressed, "Dear Educators." Sullivan said he was "amazed at how crooked or distorted some events are portrayed: but I realize that a bender of the truth, and a bender of the rules couldn't possibly portray events straight, accurate, or complete." Presumably, the reference was to Association President Phil Bender. Sullivan stated that "the RVEA leadership (?) either doesn't know [about the fee collection procedure] or is playing 'dumb' in order to harass me." He also stated that Bender "doesn't know or doesn't choose to follow your own RVEA constitution if it interferes with his own desired outcomes." Sullivan further stated that he was not at that time "obligated to any other payments." He also accused the current leadership of the Association of engaging in "secret deals, illegal agreements, disregard of constitutional guidelines, and failure to represent the membership." (Pet. App. at 39a.) All of Sullivan's statements were patently false.

Contrary to previous instructions to send the fee to the Association on or before March 3, 1993, Sullivan sent his second payment for the 1992-93 agency shop fees on April 28, 1993 to the MEA. (Pet. App. at 38a-39a.)

On May 24, 1993, Sullivan demanded a pre-termination hearing. Sullivan represents in his Petition that the pre-termination hearing was for the purpose of airing issues concerning agency shop representation fees. (Pet. at 6.) To the contrary, the purpose of a pre-termination hearing is to allow the individual to prove compliance

with the agency shop provision of Article II of the collective bargaining agreement. (*See* p. 4, *supra.*)

At the time Sullivan demanded a pre-termination hearing, he neglected to inform either the Board or the Association that he had paid his fees to the MEA. Having failed to communicate the fact that payment had been made, a pre-termination hearing was scheduled. The Board advised Sullivan that his employment would be terminated at the conclusion of the 1992-93 school year unless Sullivan and the Association advised the Board that Sullivan had paid the agency shop representation fee and the charges for his termination had been withdrawn.

When the Association finally became aware of Sullivan's payment, the charges against him were once again promptly withdrawn. The Board properly notified Sullivan and canceled Sullivan's pre-termination hearing. (Pet. App. at 11a, 39a.)

Sullivan insisted upon a "name clearing hearing." When the Board refused, Sullivan filed this suit, alleging a myriad of state torts and constitutional claims involving equal protection, procedural due process, and free speech. (Pet. App. at 2a-4a, 12a, 20a-23a, 25a-26a, 40a, 48a-54a.)

Contrary to his Petition, Sullivan did not lose employment, salary, benefits, or any of the other rights, privileges or accouterments of employment which he enjoyed as a teacher in the River Valley School District during the period at issue in this suit. He was employed on a regular, full-time basis during the 1990-91 through 1993-94 school years. (Pet. App. at 22a, 39a, 50a, 52a.)

II. THE PROCEEDINGS BELOW.

The Petition accurately sets forth the dates and actions taken by the lower courts. However, it omits several portions of the record which demonstrate there is no cause for this Court's review of the question presented.

In its unpublished opinion dated July 11, 1997, the Michigan Court of Appeals explained its basis for finding Sullivan was not deprived of any constitutional rights. Regarding free speech and due process, it said, "Plaintiff's statements regarding RVEA [Association] and RVSB [Board] were solely of private concern, namely, plaintiff's application for a coaching position, his subsequent withdrawal from the union, and his payment of representation fees." (Pet. App. at 21a.) The court, therefore, affirmed the trial court's ruling of dismissal.

The Michigan Court of Appeals held that Sullivan suffered no adverse employment action and otherwise "failed to demonstrate that due process required that he be afforded a 'name clearing' hearing." (Pet. App. at 22a.)

Finally, the Court of Appeals held that Sullivan, having failed to show he was deprived of his constitutional rights, also failed to state a claim in violation of 42 U.S.C. § 1986. (Pet. App. at 23a.)

The Michigan Supreme Court's Order, entered on September 15, 1998, remanded the case for reconsideration of Sullivan's First Amendment claim in light of *Chappel v. Montgomery County Fire Protection District No. 1*, 131 F.3d 564 (6th Cir. 1997). (Pet. App. at 6a-7a.)

On remand from the Michigan Supreme Court, the Court of Appeals, in a second unpublished opinion, followed the Sixth Circuit's decision in the *Chappel* case that an individual's personal motives for speaking are not dispositive of the issue of whether the speech addressed a matter of public concern. (Pet. App. at 3a.) Following *Chappel*, the court reviewed Sullivan's First Amendment allegations, "and being mindful that it is the message, rather than the motive, that is of utmost importance, *Chappel, supra*, we conclude that the speech at issue was not on a matter of public concern." *Id.* Having found once again that Sullivan's speech was not protected by the First Amendment because it did not involve a matter of public concern, the dismissal of Sullivan's First Amendment claim was affirmed. (Pet. App. at 4a.)

SUMMARY OF THE ARGUMENT

This petition should be denied for two reasons, each of which, standing alone, is sufficient. First, the decisions of the Michigan courts below were correct. They correctly interpreted this Court's decisions regarding the First Amendment rights of public employees, as well as the Sixth Circuit Court of Appeals' decision in *Chappel*. Sullivan's speech was of private, not public, interest. Even if that were not the case, no adverse action was taken against him because of that speech. Finally, the Association and Bender are a private, non-profit corporation and its president, a private individual. As such, they were not acting under color of state law.

Second, and apart from the merits, numerous other reasons exist to deny the petition. Sullivan has misrepresented the record. The arguments contained in the petition do not always relate to the question presented for review by Sullivan. No split of authority on the issue presented in this case has been identified.

The mere fact that Sullivan disagrees with the Michigan courts' findings of fact and application of the appropriate law to those facts is insufficient to justify issuance of a writ.

ARGUMENT*

I. THE DECISIONS OF THE MICHIGAN COURTS WERE CORRECT AS A MATTER OF SUBSTANTIVE FIRST AMENDMENT LAW.

The watershed case law controlling this matter was set forth by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968); *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983); and *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). These cases stand for the following basic propositions:

> 1. The speech of public employees may, under appropriate circumstances, be protected by the First Amendment to the United States Constitution.

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* Counsel for Respondents thank Michael M. Shoudy, Esq. for his assistance in the preparation of this brief.

2. To be protected, the speech must involve matters of public concern, not matters of only personal interest to the employee.

3. If the speech is otherwise protected, it must also be determined whether the public employer's interest in controlling the workplace outweighs the employee's right to speak on such matters.

4. The employee bears the burden of proving that his speech was a substantial motivating factor in the decision to take an adverse action against him.

5. If an employee carries this burden, the employer must show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected speech.

Fundamental to all employee free speech cases is (1) the existence of protected speech, and (2) some type of adverse employment action, *e.g.*, a discharge, suspension, transfer, demotion, etc.

A. Petitioner's Speech Did Not Involve Matters of Public Concern.

All things which a public employee says about his employment or his employers do not necessarily constitute matters of public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick, supra,* at 461 U.S. 138, 147-148. When an employee "speaks not as a citizen upon matters of public concern,

but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision. . . . " *Id.* at 461 U.S. 138, 147. To "presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." *Id.* at 461 U.S. 138, 149. "[T]he First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." *Id.*

Consistent therewith, the Michigan Court of Appeals found, upon remand:

> Though critical of RVEA and RVSB, plaintiff's speech was a "mere extension" of plaintiff's dispute over his unsuccessful bid for a coaching position, his subsequent withdrawal from the union, and his dispute regarding payment of representation fees. *Connick, supra* at 148. The speech at issue reflected nothing more than complaints regarding an essentially private employment dispute, and "an attempt to turn [plaintiff's] displeasure into a cause celebre." Such speech is not subject to protection by the First Amendment. Consequently, plaintiff's § 1983 action alleging a denial of his freedom of speech was properly dismissed.

(Pet. App. at 3a-4a; footnote omitted.)

As pointed out in detail in our Statement of the Case, Sullivan's sole complaints as to these Respondents related to: (1) their inability to secure his coaching job for him, even though they arbitrated his grievance, resulting

in what he thought was a violation of his contractual rights, and (2) their attempt to collect agency fees from him pursuant to a contractually mandated, statutorily authorized, constitutionally validated agency fee procedure.[1]

The gravamen of Sullivan's argument is either that the Michigan courts were wrong as a matter of fact, or made a mistake in the law, albeit applying the right cases and standards. These are not satisfactory grounds for the grant of a petition for writ of certiorari.

B. The Michigan Courts' Decisions Were Not Contrary to *Chappel v. Montgomery County Fire Protection District No. 1.*

After the Michigan Court of Appeals affirmed the trial court's decisions granting summary disposition, the Michigan Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for further consideration in light of *Chappel v. Montgomery County Fire Protection District No. 1, supra.*

Sullivan's reliance on *Chappel* is misplaced, for two reasons. First, the case is factually distinguishable. In *Chappel*, the speech related to misappropriation of funds,

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[1] Regarding the MEA agency fee procedure, *see Detroit Board of Education v. Parks*, 417 Mich. 268 (1983); Mich. Comp. Laws § 423.210; *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Ass'n.*, 707 F. Supp. 1490 (W.D. Mich. 1989); and *Jibson v. Michigan Education Ass'n.*, 30 F.3d 723 (6th Cir. 1994).

poor collection methods, nepotism, and inadequate training and standard operating procedures of the ambulance district. These subjects were unrelated to Chappel's employment.

Second, actual adverse actions were taken against Chappel. He alleged retaliation in the form of an involuntary transfer to a less desirable position. This transfer made him unable to participate in regular ambulance runs, which originated from another location. Further, Chappel applied for a position as a paramedic. He was initially offered a part-time, on-call position. However, this appointment was later revoked, for the stated reason that Chappel was "a threat to the harmonious team atmosphere." All of this was attributable to the employer's retaliation for exercise of Chappel's free speech rights. *Id.* at 568-569.

In this case, no adverse action was taken against Sullivan as a result of his speech. The original loss of his coaching position preceded any of the speech at issue here. During the 1991-92 and 1992-93 school years, the Association initiated discharge proceedings to enforce the agency shop provisions of its collective bargaining agreement with the Board. However, in both school years, Sullivan ultimately paid his fees and the charges against him were withdrawn. He was not disciplined, discharged, or otherwise unfairly treated as a result of the agency fee proceedings. The adverse action of which Sullivan now complains – a suspension – occurred in the 1995-96 through 1997-98 school years, pursuant to tenure charges filed by the Board on April 27, 1995, well after the filing of this lawsuit and a decision by the trial court on Respondent's motions. Morever, Sullivan's suspension

was never raised as an issue in this litigation, and was never before the courts in the Michigan court proceedings.

Second, and more importantly, the Michigan Court of Appeals did reconsider the case in light of *Chappel;* it correctly applied the standards in *Chappel* to the facts which had previously been found; and it ruled as indicated in Section I(A) above. Thus, this Court's prior rulings, and the Sixth Circuit's decision in *Chappel,* were recognized, considered, and applied in this case. Sullivan is simply dissatisfied with the result.

C. No Adverse Action Was Taken by Respondents Against the Petitioner.

The Michigan Court of Appeals' decision on remand did not reach this issue. (Pet. App. at 4a, n. 3.) Even if this Petition were granted and a writ issued, and even assuming Sullivan prevailed on the merits of his "public vs. private speech" argument, the case would be remanded for further consideration. This would result in a determination that no adverse action had been taken against Sullivan.

In those cases involving constitutionally protected free speech, all have involved serious adverse action taken against the employee. For example, Pickering was fired. *Pickering, supra.* Myers was fired. *Connick, supra.* Chappel received an involuntary transfer to a less desirable position and was denied promotions. *Chappel, supra.*

In this case, there was no adverse action taken against Sullivan.

D. The Activities of Bender and the Association Did Not Constitute Action Taken Under Color of State Law.

Again, the Michigan Court of Appeals did not reach this issue. (Pet. App. at 4a, n. 3.) If this matter is remanded, however, these Respondents will be dismissed because their activities simply do not constitute state action or action taken under color of state law – a prerequisite to reaching the merits at all. 42 U.S.C. § 1983. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 42 L.Ed.2d 477 (1974) (inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the entity); and *Messman v. Helmke*, 133 F.3d 1042, 1043-1045 (7th Cir. 1998) (a union is generally not a "state actor" for the purposes of the First Amendment or a § 1983 action).

The Association is a private, non-profit corporation and labor organization. Bender was its President. The Association is affiliated with the MEA and NEA, both of which are private, non-profit corporations. The record is devoid of any evidence that their actions constituted state action or action taken under color of state law.

Sullivan's claims of conspiracy under 42 U.S.C. § 1986 have not been raised as questions presented for review in this Petition and, as such, are not at issue now. Sup. Ct. R. 14(1)(a).

II. IN ADDITION TO LACK OF MERIT, A NUMBER OF OTHER REASONS EXIST TO DENY THE PETITION.

A. Petitioner Has Misrepresented the Facts in His Statement of the Case.

By way of example only: Petitioner claims that the adverse employment action taken against him, which supposedly was his two and a half year suspension, was in retaliation for the exercise of his free speech rights. (Pet. at 5-6.) However, he was not suspended until after this suit was decided.

Sullivan asserts that the agency shop proceedings brought against him were in retaliation for the exercise of his free speech rights, but it is clear from the record that they were because he had failed to pay his agency fee. As soon as the Association learned that he had paid, the charges were withdrawn for that reason. No "hearing" was necessary.

In fact, the entire idea that Sullivan was discharged, disciplined, or otherwise adversely treated in his employment as a result of his speech is completely without support in the record.

Pursuant to Rule 14(4) of the Rules of the Supreme Court of the United States, Petitioner's failure to accurately present what is essential to understand the question presented "is sufficient reason for the Court to deny a petition."

B. Petitioner's Arguments Are, in Many Cases, Unrelated to His Statement of Questions Presented for Review.

Pursuant to Rule 14(1)(a) of the Rules of the Supreme Court of the United States, a petitioner must "concisely" set forth the "questions presented for review," and "only the questions set out in the petition, or fairly included therein, will be considered by the Court."

In this case, Sullivan presents one question for review, *i.e.*, whether the Michigan courts misinterpreted federal precedent regarding public employee free speech claims. (Pet. at i.) However, he has spent considerable time and effort arguing that his procedural due process rights were denied when he was allegedly refused a hearing of some sort during which he could argue his political positions. Those allegations and arguments are not material to the question presented.

C. Petitioner Has Failed to Identify any Conflict Between the Circuits on the Issue of Public versus Private Speech.

We have been unable to identify such a conflict, and Petitioner has presented none. This Court's precedent, as set forth in *Pickering*, *Connick*, and *Mt. Healthy*, is long-standing and well-established. The circuits seem to be following it without deviation or conflict.

For example, *see Alinovi v. Worcester School Committee*, 777 F.2d 776 (1st Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (teacher who posted internal disciplinary letters issued to her in an attempt to assert administrative misconduct

was not engaged in speech of public concern); *Ezekowo v. NYC Health and Hospitals Corp.*, 940 F.2d 775 (1991), *cert. denied*, 502 U.S. 1013 (1991) (employee's speech regarding quality of medical education, quality of hospital maintenance, and complaints regarding teacher physicians, deemed not to constitute speech regarding matters of public concern); *Sanguigni v. Pittsburgh Board of Public Education*, 968 F.2d 393 (3rd Cir. 1992) (employee teacher/coach complaints, made in a faculty newsletter, alleging harassment, oppression and retaliation in the school where she worked, deemed not to be speech involving matters of public concern); *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 47, 142 L.Ed.2d 36 (1998) (employee's selection of a play and editing of a play in face of complaints by the employer principal, did not present a matter of public concern); *Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (employee who was discharged for issuing press release challenging a hospital president's proposed spending of a tax levy and for raising concerns regarding "patient endangerment," was not speaking on matters of public concern); *Phares v. Gustafsson*, 856 F.2d 1003 (7th Cir. 1988) (public employee's speech concerning what information should be contained in medical records at a university veterinary hospital, growing out of a dispute as to whether employee should be promoted, held not to be speech regarding matter of public concern); *Bausworth v. Hazelwood School District*, 986 F.2d 1197 (8th Cir. 1992), *reh'g denied*, (1993) (public employee's statements regarding school district employer's decision to require parents

to pay for bus service, resulting in bus driver's termination, held not to be speech involving matter of public concern); *Bunger v. University of Oklahoma*, 95 F.3d 987 (10th Cir. 1996) (non-tenured professors' complaint relating to election procedures for graduate council membership from the school of business held not to involve speech of matter of public concern); *Murray v. Gardner*, 741 F.3d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) (employee's protestations regarding the FBI's furlough procedures, which he asserted involved the expenditure of public monies and affected the quality of the federal work force, did not constitute speech involving a matter of public concern); and *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986) (public employee teacher who spoke out against a high school's use of "collegiate registration" – a procedure by which students were permitted to choose their subjects and teachers – which resulted in teacher's transfer to a less desirable position, held not to involve constitutionally protected speech regarding matters of public interest).

This Court's prior decisions have been consistently applied in the circuits, including the Sixth Circuit.

CONCLUSION AND RELIEF

The Michigan courts accurately identified the cases, followed the appropriate standards, and applied them correctly in this matter.

Petitioner has seriously misrepresented the record in this case, failed to adequately identify and argue his issue, and also failed to identify any split between the

circuits in connection to the application of *Pickering, Connick, Mt. Healthy,* or *Chappel.*

For these reasons, it is respectfully requested that this Petition for Writ of Certiorari to the Michigan Supreme Court be denied.

Respectfully submitted,

THOMAS A. BAIRD (P29050)
Counsel of Record
SHIRLEE M. BOBRYK (P36919)
WHITE, PRZYBYLOWICZ,
SCHNEIDER & BAIRD, P.C.
Counsel for Respondents
River Valley Education
Ass'n & Bender
2300 Jolly Oak Road
Okemos, MI 48864
517/349-7744

Dated: October 18, 1999

APPENDIX
ATTACHMENT NO. 1

[LOGO] **River Valley School District**

15480 Three Oaks Road
Three Oaks, Michigan 49128
(616) 756-8541 or
(616) 426-4415
Fax (616) 756-6631

July 25, 1995

Mr. Richard A. Sullivan
7298 Spring Road
Harbert, MI 49115

RE: Decision by the Board of Education of the River Valley School District To Proceed Upon Charges Recommending and Proposing Your Discharge Filed July 20, 1995

Dear Mr. Sullivan:

You are hereby advised that pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102, the Board of Education of the River Valley School District at its meeting of July 24, 1995 decided to proceed upon the charges filed against you by Superintendent Donald D. Larson, former Superintendent Charles O. Williams and Business Manager Gustave Damaske, recommending and proposing your discharge. In accordance with Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102, you are hereby provided and furnished with copies of the written decision of the Board of Education to proceed upon the charges (Attachment A), a written statement of the charges (Attachment B), and a statement of your rights as a tenured teacher under Article IV of the Michigan Teacher Tenure Act (Attachment C).

You are hereby advised that you may contest the decision of the Board of Education to proceed upon the charges by filing a claim of appeal with the State Tenure Commission and serving a copy of the claim of appeal on the Board of Education not later than twenty (20) days after receipt of the Board of Education's decision. Should you not contest the Board of Education's decision to proceed upon the charges in the time and manner specified in Article IV, Section 4(1), of the Michigan Teacher Tenure Act, MCL 38.104(1), your discharge as specified in the charges will take effect and it shall be considered that you have waived any right to contest your discharge under the Act.

Sincerely,

/s/ David Ponegalek, Jr.
David Ponegalek, Jr., Secretary
RIVER VALLEY
BOARD OF EDUCATION

DDL/gev

ATTACHMENT A

RESOLUTION

DECISION TO PROCEED
UPON TENURE ACT CHARGES

River Valley School District, Berrien County, Michigan (the "District").

A regular meeting of the Board of Education of the School District was held in the administrative offices of the School District located at 15480 Three Oaks Road,

Three Oaks, Michigan, on the 24th day of July, 1995 at 7:30 in the evening.

The meeting was called to order by Dennis A. Zeiger, President.

Present: Members Dennis A. Zeiger,
Jane Temple,
Gary Sommers,
David Ponegalek, Jr.,
Pam Behnke, and
Greg Scygiel

Absent: Members Tom Mikula

The following preamble and resolution were offered by Member Behnke and supported by Member Temple:

WHEREAS, Superintendent Donald D. Larson, former Superintendent Charles O. Williams and Business Manager Gustave Damaske, pursuant to Article IV, Section 2 of the Michigan Teacher Tenure Act, MCL 38.102, on July 20, 1995, filed with the Secretary of this Board of Education charges against Richard A. Sullivan, a tenured classroom teacher employed with the River Valley School District; and

WHEREAS, this Board of Education has a duty under Article IV, Section 2 of the Michigan Teacher Tenure Act, MCL 38.102, to determine whether or not to proceed upon such charges; and

WHEREAS, this Board of Education has deliberated with respect to whether or not to proceed upon such charges as filed and whether or not to modify those charges and to proceed upon modified charges.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. This Board of Education hereby decides and determines to proceed upon the charges filed by Superintendent Donald D. Larson, former Superintendent Charles O. Williams and Business Manager Gustave Damaske, on July 20, 1995, as filed, without modification, including the recommendation and proposed outcome for the disposition of this matter.

2. Pursuant to Article IV, Section 3 of the Michigan Teacher Tenure Act, MCL 38.103, Richard A. Sullivan is hereby suspended from active performance of duty with continued compensation pending a disposition of the charges or further action of the Board of Education.

3. This Board of Education hereby directs the Secretary of the Board of Education to provide and furnish to the teacher, Richard A. Sullivan, a copy of this resolution as the written decision to proceed upon the charges, a copy of the charges which have been filed with Board of Education and upon which this Board of Education has decided and determined to proceed, as a written statement of the charges, and a copy of the Michigan Teacher Tenure Act, as amended. MCL 38.71, *et seq.*, as a statement of the teacher's rights under Article IV thereof, in compliance with Article IV, Section 2 of the Michigan Teacher Tenure Act, MCL 38.102. Further, this Board of Education hereby directs the Secretary of the Board of Education to inform the teacher, Richard A. Sullivan, that he may contest the Board of Education's decision to proceed upon the charges by filing a claim of appeal with the State Tenure Commission and serving a copy of the claim of appeal on the Board of Education not later than twenty

(20) days after receipt of the Board of Education's decision and that if he does not contest the Board of Education's decision in the time and manner specified in Article IV, Section 4(1) of the Michigan Teacher Tenure Act, MCL 38.104(1), the recommendation and proposed outcome for disposition of this matter as specified in the charges will take effect and he shall be considered to have waived any right to contest that action.

4. That said charges against the teacher, Richard A. Sullivan, were filed with the Secretary of this Board of Education on July 20, 1995, and this Board of Education decided and determined to proceed upon said charges this 24th day of July, 1995.

5. All resolutions and parts of resolutions insofar as they conflict with the provisions of this resolution be and the same are hereby rescinded.

Ayes: Members Dennis A. Zeiger,
Jane Temple,
Gary Sommers,
David Ponegalek, Jr.,
Pam Behnke, and
Greg Scygiel

Nays: Members None

Motion declared adopted.

/s/ David L. Ponegalek, Jr.
Secretary, Board of Education

The undersigned duly qualified and acting Secretary of the Board of Education of River Valley School District, Berrien County, Michigan, hereby certified that the foregoing is a true and complete copy of a resolution adopted

by the Board at a regular meeting held on July 24, 1995, the original of which resolution is a part of the Board's minutes and further certifies that notice of the meeting was given to the public under the "Open Meetings Act", MCL 15.261, *et seq.*

/s/ David L. Ponegalek, Jr.
Secretary, Board of Education

ATTACHMENT B

[LOGO] River Valley School District

15480 Three Oaks Road
Three Oaks, Michigan 49128
(616) 756-9541 or
(616) 426-4415
Fax (616) 756-6631

July 20, 1995

Mr. David L. Ponegalek, Jr.
Secretary, Board of Education
River Valley School District
15480 Three Oaks Road
Three Oaks, MI 49128

Re: Richard A. Sullivan
Charges Pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102
Proposal and Recommendation for Discharge

Dear Mr. Ponegalek:

We, the undersigned Charging Parties, are submitting this communication pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102, to file

charges against Richard A. Sullivan, a tenured classroom teacher, currently employed with the River Valley School District. We are proposing and recommending that Richard A. Sullivan be discharged from his employment with the River Valley School District as the proposed outcome and disposition of this matter, because of his misconduct and acts of insubordination during the 1994-95 school year, as hereinafter specified.

We, the undersigned Charging Parties, hereby bring and specify the charges against Richard A. Sullivan as follows:

1. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks.

2. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, on or about February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of that student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.

3. Richard A. Sullivan engaged in an act of misconduct and insubordination by his failure

to report for a meeting with then Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.

4. Richard A. Sullivan engaged in an act of misconduct and insubordination by leaving the school building, River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, scheduled for 2:30 p.m. on that date.

5. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O. Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams, to have a physical and mental examination at the expense of the Board of Education according to Article IX (1)(e) of the collective bargaining agreement between the River Valley School District and the River Valley Education Association 5-CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letters dated May 23, 1995 and May 31, 1995, to make appointments for a physical

exam and a psychological exam by a physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. Richard A. Sullivan engaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16, 1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education January 23, 1995 at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual members of the Board of Education, refusing to comply with directives given to him by the president of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the president of the Board of Education, Dennis A. Zeiger, "You'll be sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

10. Richard A. Sullivan engaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

Richard A. Sullivan by the actions and conduct as specified in the above charges, has demonstrated that he is not fit for continued employment with the River Valley School District and that he must be discharged as recommended and proposed. His actions and conduct demonstrate a lack of responsible judgement and constitute a breach and violation of the responsibilities of his employment. His actions and conduct have adversely affected the operation and administration of the School District and the administrators, teachers, students and parents involved in these circumstances, which justifies his discharge from employment with the School District.

Wherefore, we, the undersigned Charging Parties, ask, recommend and propose that the Board of Education take the necessary action to proceed upon the charges as filed and effect the proposed outcome of the discharge of Richard A. Sullivan from his employment with the River Valley School District.

Sincerely,

RIVER VALLEY SCHOOL DISTRICT

/s/ Donald D. Larson
Donald D. Larson
Superintendent
Dated: July 19, 1995

/s/ Charles O. Williams
Charles O. Williams
Former Superintendent
Dated: July 19, 1995

/s/ Gustave A. Damaske
Gustave A. Damaske
Business Manager
Dated: July 19, 1995

DDL/CLW/gev

cc: Board of Education Members
C. Mostosky, Union Rep.
R. Jelinek, RVEA President
G. Johnson, Attorney
R. Yingst, Attorney

APPENDIX
ATTACHMENT NO. 2

STATE OF MICHIGAN
STATE TENURE COMMISSION

RICHARD A. SULLIVAN,

Appellant

v Docket No. 95-25

RIVER VALLEY SCHOOL DISTRICT
BOARD OF EDUCATION,

Appellee

Attorney for Appellant: Dirk F. Zuschlag
AMBERG, MCNENLY, ZUSCHLAG FIRESTONE AND LEE, P.C.
24300 Southfield Road
Suite 101
Southfield, Michigan 48075
Phone: (810) 559-8110

Attorney for Appellee: C. George Johnson
THRUN, MAATSCH AND NORDBERG, P.C.
501 South Capitol Avenue
Suite 500, P. O. Box 40699
Lansing, Michigan 48901-7899
Phone: (517) 484-8000

PRELIMINARY DECISION AND ORDER

BACKGROUND FACTS

Appellant Richard A. Sullivan, a tenured teacher has been employed by the River Valley School District since 1977 teaching physical education at all levels, health education in the high school and 4th grade, and general math in 6th and 8th grades and in the high school. On April 27, 1995, the superintendent, Dr. Charles O. Williams, filed

charges against appellant and suspended appellant with pay pending the River Valley School District Board of Education's (board) decision on the charges. On July 24, 1995, the board affirmed appellant's suspension and voted to proceed with the following charges which stated that appellant had:

> 1. [E]xercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Mizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate and cynical remarks.
>
> 2. [E]xercised poor professional judgment and engaged in misconduct, on or about February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of the student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.
>
> 3. [E]ngaged in an act of misconduct and insubordination by his failure to report for a meeting with then, Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.
>
> 4. [E]ngaged in an act of misconduct and insubordination by leaving the school building,

River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, as scheduled for 2:30 p.m. on that date.

5. [E]ngaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. [E]ngaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams to have a physical and mental examination at the expense of the Board of Education according to Article XI (1) (e) of the collective bargaining agreement between the River Valley Education Association 5 – CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letter dated May 23, 1995 and May 31, 1995, to make appointments for a physical exam and psychological exam by a physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. [E]ngaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16,

1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. [E]ngaged in an act of misconduct and insubordination by his behavior at a meeting of the board of Education January 23, 1995 at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. [E]ngaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the President of the Board of Education, Dennis A. Zieger, "You'll be sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "you will regret this."

10. [E]ngaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

Appellant filed a timely appeal with the State Tenure Commission contesting the Board's action. Also, appellant filed a Motion for Partial Summary Disposition/ Judgment to Dismiss Charge Nos 1, 6, 8, 9 and 10. Administrative Law Judge Tessema Berga, assigned to hear this case, dismissed charges 1 and 10 on the grounds that appellant was exercising his constitutional right of free speech and that his refusal to sign his evaluation document was innocuous and could not, in any way, have been an obstacle to the evaluation process. Appellee requested that a separate record be kept for these two dismissed charges in the event the State Tenure Commission chose to review the decision. The administrative law judge granted the request. Administrative Law Judge Tessema Berga heard the remaining matters on October 3, 6, 7, 8, 9, 10, 14 and 15.

ISSUE

Is there just and reasonable cause to discharge appellant?

FINDINGS OF FACT

Appellant had satisfactory evaluations until the second semester of the 1994-95 school year. (Tr Vol II, p 6). In September 1994, the district suspended appellant without pay for two days for failure to sign and return his individual contract for the 1993-94 school year. Appellant filed a grievance and the board assigned its counsel, Mr. C. George Johnson, to conduct the hearing. Mr. Johnson denied the grievance and the appellant grieved the matter before the board. On January 23, 1995, the board

upheld the hearing officer's decision. (Tr Vol II, pp 165-170).

Dr. Williams testified that appellant was critical of the board because he felt it did not follow its own policies and procedures. In the past, appellant had written to the board members directly about his concerns, aspects of the curriculum and the superintendent's contract. (Tr Vol II, pp 11-13). In the last four years, appellant testified that he had attended between 20 to 25 board meetings and he had indicated his interest in the issue of the renewal of administrators' contracts. He had filed many grievances against the administration, had spoken to reporters about the board, and has litigation pending against the district. (Tr Vol VIII, pp 41, 46, 47, 51). The president of the board, in reference to appellant, stated that "if I had a thorn in my side, I would pull it out." (Tr Vol IX, p 240). In response to whether the superintendent has told a board member that appellant might have a nervous breakdown, Dr. Williams testified that he does not recall one way or the other. (Tr Vol II, p 21). The testimony of the witnesses reveal that there was animus between appellant and the board, as well as appellant and the administration.

For the purpose of organizing this lengthy case, I have discussed below six significant dates because the various charges stem from incidents which occurred on those dates. A summary of each of those dates follows: On January 23, 1995, the board considered appellant's grievance against the board hearing officer's decision. On February 6, 1995, the board met to consider changing a grade of a student who appealed appellant's grade, pursuant to MCL 380.124, *et seq*; MSA 15.41249, *et seq* (Exhibit F). On March 6, 1995, appellant was directed to attend a

meeting with the superintendent. On April 24, 1995, the board met to consider if appellant had paid his representation fee. On April 27, 1995, the superintendent suspended appellant with pay pending the board's decision. On May 8, 1995, appellant was directed to submit a physical and psychological examination from a list of physicians selected by the superintendent.

JANUARY 23, 1995

The board met in the library of the River Valley High School. Shortly after the meeting began, the president of the board, Mr. Zeiger, recognized appellant and the latter addressed the board on the propriety of the board's counsel holding the hearing on appellant's grievance. (Tr Vol VIII, pp 201-204). The manner in which appellant addressed the board formed the basis of charge 8.

Dr. Williams testified that as appellant began to talk his volume increased and he began pacing from one end of the board table to the other. Further, Dr. Williams testified that appellant went from board member to board member inquiring, "Have you read this? Have you read this?" Appellant, according to Dr. Williams moved to the next member regardless of the answer. By the time he got to Member Mikula, appellant was "leaning clear across the table, flashing this paper [partially folded] in their face within two or three inches." (Tr Vol I, pp 35-41).

According to Dr. Williams, while appellant was going from board member to board member, Mr. Zeiger ordered him to sit and be quiet. Appellant continued progressing down the table for about a minute; as he did so, Mr. Zieger used the gavel to get appellant's attention. When

appellant was done, appellant went to his chair and sat, after which the board without discussion approved the hearing officer's recommendation. (Exhibit 6; Tr Vol I, p 43).

Appellant testified that because he is a physical education and classroom teacher he talks louder than most people and moves around a lot. He further testified that he is more demonstrative when he talks. At the January 23, 1995 meeting, appellant admitted that he went from board member to board member and showed them specific documents and asked them, "Do you have it? Is it in your packet?" He further testified that he placed the documents right on the table, about 18 inches to 24 inches from the members so they could read them. Appellant testified that when Mr. Zieger told him "Your time is up" or words to that effect he showed the documents to the remaining two members and sat. (Tr Vol VIII, pp 204-209).

Mr. Zeiger described appellant's demeanor as "totally forceful" and intimidating when he approached the board members. However, Mr. Zeiger testified that he was not fearful. His main concern was to get the meeting under control; appellant's approach toward the board members, Mr. Zeiger felt, was getting out of control. According to Mr. Zeiger, appellant got within two and a half feet of his board members and asked individual members if they had read various documents, when Mr. Zeiger asked appellant to sit. Mr. Zeiger again asked appellant to sit and told him that he was out of order. Finally, Mr. Zeiger testified that he used the gavel once and told appellant that he was out of order; appellant at the point was finishing his presentation and he sat. (Tr Vol III, pp 111-115). Also, Mr. Zeiger testified that he did

not take any offense by appellant's action, nor would he describe appellant's action as so strident as to be outrageous. (Tr Vol III, p. 116).

Mr. Gustave Damaske, the business manager for the school district, was present at the January 23, 1995 meeting. He testified that appellant was agitated, talking in above average tone of voice, and that he moved from board member to board member and asked questions and before they had a chance to answer moved to the next member and asked a different question. (Tr Vol IV, p 88). Mr. Damaske further testified that initially appellant's mode of speaking and standing was not different from his previous mode. However, as he continued "his behavior escalated to becoming more antagonistic and argumentative toward the board." Finally, Mr. Damaske testified that Mr. Zeiger asked appellant two or three times to sit. (Tr Vol V, pp 7, 10, 22).

FEBRUARY 6, 1995

On this date, the board in a special closed meeting convened to consider a grade change appeal pursuant to the grade change statute, MCL 380.1249, *et seq*; MSA 15.41249, *et seq*. (Exhibit F). The mother of a student appealed a "D-" grade her son received in his strength training class. The district convened a panel to review the student's grade. The panel then recommended raising the student's grade to a "B". Appellant appealed the panel's decision. At the closed meeting, appellant read from a prepared statement and gave a copy of the statement to Mr. Zeiger. On his way out, he gave a copy of the prepared statement to a reporter. The statement did not

identify the name of the student. (Tr Vol VIII, pp 88-90; Exhibits 14-16).

On February 16, 1995, a newspaper article in the *Harbor Country News* appeared under the byline of Lynn Stevens. This article did not identify the student but attributed statements to appellant which were found in the prepared statement. (Exhibit 11). Another article in a different newspaper appeared under the byline of Ms. Stevens; this time the article identified the student. (Exhibit 13). Appellant emphatically denied that he had supplied the name of the student. (Tr Vol VII, p 91).

Ms. Stevens testified that she got most of the material for her article from appellant's document. However, she testified that she did not and could not identify the name of the student from the document appellant supplied. According to Ms. Stevens, appellant refused to supply her the student's name. Instead, a young child's voice left the identity of the student on her answering machine. Moreover, she testified that she overheard the name of the student who had his grade changed at her hairdresser. Ms. Stevens then called the student's house and confirmed his identity from the student himself. (Tr Vol V, pp 222-232).

MARCH 6, 1995

Appellant was scheduled to meet Dr. Williams on March 1, 1995, and this meeting was postponed until March 6, 1995 at 2:30 p.m., to discuss a letter that appellant wrote to the student president. According to appellant, the notice of the meeting was not placed in his mailbox until March 6, between 12:02 and 12:32 p.m.

Further, Dr. Williams' letter to appellant stated that "Failure to report as directed will subject you to disciplinary action for insubordination." (Exhibit 10; Tr Vol VIII, p 109). Appellant did not appear for the meeting. His reason for not meeting with Dr. Williams was that a seventh grade volleyball practice was earlier scheduled at Sawyer-Highland Baptist Church some five miles from the school, and he was the coach of that team. He could not cancel the practice and expect the 19 students to contact their parents and inform them of the cancellation at such a late hour, and he could not leave those minors unattended as his first responsibility was to the students. Further, there was no substitute teacher to replace him; he did not think it was his responsibility to arrange for a substitute. (Tr Vol VIII, pp 108-113).

Dr. Williams confirmed that the March 6 notice was not placed in appellant's mailbox until March 6. On cross-examination, Dr. Williams testified that he was not aware that there was no substitute to replace appellant; however, Dr. Williams further stated that appellant was responsible for arranging for a substitute, as was any staff member. (Tr Vol I, pp. 69-77).

On cross-examination, appellant testified that he neither contacted Mr. Zech, the middle school principal, nor Dr. Williams about the 2:30 meeting and the problem he had encountered, nor had he contacted Mr. Zech to arrange for a substitute. (Tr Vol IX, pp 140-142).

APRIL 24, 1995

The board met at a special meeting, to consider whether appellant had paid his representation fees to the

union pursuant to the collective bargaining agreement between the board and the union. According to Dr. Williams, he received a letter from the union indicating that appellant had not paid the representation fee and the union, therefore, requested that the amount be withheld pursuant to Article II of the collective bargaining agreement. (Tr Vol III, pp 12-14). Article II of the agreement states in part:

> If the teacher fails to remit the fee or fails to authorize deduction for same, the Association may request the Board to make the deduction. The Board, upon receipt of the request for mandatory fee deduction from the Association shall provide the bargaining unit member with an opportunity for a due process hearing. This hearing shall address the question of whether or not the bargaining unit member has remitted the service fee to the association or authorized payroll deduction of same.

At the April 24, meeting, Mr. Zeiger called the meeting to order and explained to appellant that the board was not conducting a hearing. The sole matter for the board to determine was "yes or no" to the question of whether appellant had paid his representation fees. (Tr Vol III, pp 127-129). Appellant indicated that the whole issue was before an arbitrator. Therefore he could not be owing any money when the decision of the arbitrator was pending. Also, appellant asked to see the "allegations" and face his "accusers", and finally he stated that he had paid what he is expected to pay. (Tr Vol VIII, pp 220-223). The board was only interested in receiving a "yes" or "no" answer and was not interested in what it considered were side issues. (Tr Vol III, p 16). Mr. Zeiger asked for a

motion to withhold the fee from appellant, because "appellant was at the point of being completely out of hand." The board voted on the motion and the meeting ended. Appellant was very angry, according to Mr. Zeiger, and then said to Mr. Zeiger, "You'll be sorry for this." According to Mr. Zeiger, board members were very nervous and one board member stood up. (Tr Vol III, pp 131-133).

In preparation for the April 24 meeting, Mr. Damaske had already prepared a check for the representation fee, payable to the River Valley Education Association (RVEA), should he have been directed to turn over the check to the union. Further, Mr. Damaske testified that were the board to have decided that appellant had paid the fee, the check would have been voided. (Tr Vol IV, p 94).

Mr. Damaske testified that after the meeting began, Mr. Zeiger asked appellant two or three times if he had paid the representation fee. According to Mr. Damaske, appellant did not answer "yes" or "no", instead he asked to face his accusers. After the meeting's adjournment, Mr. Scygiel went out of the library and held a conversation with Mr. Magley and his wife. According to Mr. Scygiel, as appellant walked by him, he referred to Mr. Scygiel as Mr. Sommers and said, "I hope you know what you're doing Mr. Sommers, or you'll regret this" and continued walking past him. (Tr Vol V, p 141).

APRIL 27, 1995

According to Dr. Williams, at 2:00 p.m., on April 27, 1995, he suspended appellant and instructed him to turn

in his grade and lesson plan books to the school office before appellant left the school premises. Between 3:30 and 4:00 p.m., Dr. Williams testified that he checked with the high school and middle school principals to determine if appellant had left the books with them. He then went to appellant's office and searched his desk drawers. He did not find the lesson plan and grade books. (Tr Vol I, pp 127-128). Dr. Williams was quite emphatic that he orally directed appellant to turn in the grade and lesson plan books to the school office. (Tr Vol IX, pp 215, 216).

Mr. Douglas Degner, principal of the high school where appellant taught, testified that, on April 28, 1995, he checked with his secretary to see if appellant had left the grade and lesson plan books with her. He then checked the mailbox, went with Dr. Williams to appellant's office and looked in appellant's desk drawers, filing cabinet drawers, and the top of the cabinets and could not find the books. Mr. Degner also testified that there were no written or telephone messages advising him of the whereabouts of the books. (Tr Vol V, pp 170-172, 187).

Because appellant also taught at the middle school, he reported to Mr. David Zech, the principal of the middle school, as well. Mr. Zech testified that on April 28, 1995, before 8:00 a.m., he and Dr. Williams went to appellant's office and searched thoroughly for the books without success. Mr. Zech testified that on April 27, Dr. Williams advised him that he had directed appellant to turn the books to either principal. (Tr Vol VII, pp 148-154).

On April 31, 1995, Mr. Zech again went through appellant's file cabinets and desk drawers to look for the books. In the April 28 search, Dr. Williams and he searched separate drawers. Again, Mr. Zech searched the office for the books at a later date, all to no avail. (Tr Vol VII, pp 155, 158, 163).

In response to whether Dr. Williams directed him to turn in the lesson plan and grade books to either Mr. Zech or Mr. Degner, appellant responded, "Absolutely not; these words were never spoken by Dr. Williams." Appellant testified that he left the books on top of his office desk. (Tr Vol IX, pp 153-154).

MAY 8, 1995

On May 8, 1995, the board met at an open meeting to consider Dr. Williams' recommendation. There was no discussion to indicate the substance of the recommendation. Appellant had asked for an open meeting if the board was considering any matter which pertained to him. The board made it clear that it would take questions from the audience, but only after it had voted and even then it would not respond to the questions. (Tr Vol II, pp 130-133, 135).

Appellant's attorney, Mr. Yingst, asked the board if it was considering a matter related to appellant. After the board would not answer his question, Mr. Yingst asked about the nature of the recommendation. Again, the board would not answer, nor would it let Attorney Yingst make a statement. After the board silently reviewed the matter that Dr. Williams had provided it, it voted on a

prepared motion to accept the recommendation. According to Dr. Williams, the district did not provide appellant with a copy of the recommendation and the board did not allow either appellant or his attorney to address the board before it voted. The board members did not raise any questions about the recommendation nor did they discuss the recommendation before they voted. (Tr Vol II, pp 135-138). The testimony of Dr. Williams and the exhibits revealed that the board reviewed and voted to direct appellant to undergo a physical and psychological examination. Although appellant had asked for an open meeting, the reason for the board's refusal to respond to the questions or disclose the identity of the involved person was because the meeting concerned a confidential personnel issue which they were not at liberty to discuss in public. (Tr Vol V, pp 111-115; Exhibit 26). In response to whether the May 8 meeting was an open meeting, Ms. Stevens, a free lance reporter for a local paper, testified, "This was a story that we knew where it took place. We knew the board members who voted. We had no idea to this date what they voted on or what employee it concerned. Although, ostensibly it was an open meeting, we have not been able to discover that information to this date."

On May 10, 1995, Dr. Williams notified appellant that the board at its May 8, 1995 meeting voted to direct him to submit to a physical and psychological examination at the board's expense. The district gave appellant a list of doctors to choose from to comply with the board's directive. The district notified appellant that he was to arrange for the examinations with the physicians and notify the superintendent's office by May 30, 1995. (Exhibit 28). On

May 31, 1995, Dr. Williams again directed appellant to arrange with the physicians and notify his office by June 7, 1995. Dr. Williams warned appellant that the district would consider his failure to do so to be insubordination. (Exhibit 29). Meanwhile, appellant went to two doctors outside the list of physicians provided and submitted their results to Mr. Zeiger with a copy to Dr. Williams. In his letter, appellant raised some concerns about confidentiality and fear of being stigmatized should the information be leaked. Appellant also testified that he did not trust physicians selected by the board. Further, he believed that some psychologists and psychiatrists held different beliefs than Christians, and he was not comfortable to submit to physicians he did not know or who did not hold similar beliefs as himself. (Tr Vol VIII, pp 171, 175). The board did not accept the examination results of appellant's doctors. (Tr Vol II, pp 144-145).

By a June 16, 1995 letter, Dr. Williams directed appellant to meet with him on June 25, 26, or 27, 1995 to discuss a host of issues which affected appellant and remained outstanding. Appellant did not receive this letter until June 30, 1995. (Exhibit 30).

CONCLUSIONS OF LAW

Issue 1 – Is there just and reasonable cause to discharge appellant?

Article IV, Section 1 of the Teachers' Tenure Act, MCL 38.1010; MSA 15.2001 states in part:

> Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only as provided in this Act.

Appellee bears the burden of proving by the preponderance of the evidence that just and reasonable cause exists to discharge appellant. *Luther v Board of Education of Alpena Public Schools*, 62 Mich App 32; 233 NW2d 133 (1975).

I will review each charge and decide if appellee has proven by the preponderance of the evidence whether there is just and reasonable cause to discharge appellant. Charge 2 deals with disclosure of confidential student record information in the 1994-95 school year. Ms. Lynn Stevens, to whom appellant allegedly divulged the identity of the student, testified that she did not obtain the information found in her byline from either appellant personally or from the handout he gave her. Instead, she received the information from an anonymous telephone tip, the veracity of which she later confirmed by calling the student who was the subject of the confidential information. Moreover, Ms. Stevens also testified that she had discovered the identity of the student from a conversation she overheard at her hairdresser. Finally, the information was available to students and other people in the community, even before the newspaper published it. Therefore, there was no proof that appellant was responsible for disclosing the information. Based on the testimony received, appellee has failed to prove that appellant disclosed or was responsible for the disclosure of the confidential information or engaged in misconduct as charged in Charge 2.

Charge 3 cites appellant with engaging in an act of misconduct and insubordination for failure to meet Superintendent Williams on March 6, 1995 at 2:30, as directed. Charge 4 cites appellant with engaging in an act

of misconduct and insubordination for leaving the school building without authorization on March 6, instead of attending the meeting with Superintendent Williams on March 6, at 2:30.

Appellant admitted that he received Dr. Williams' letter directing him to attend the March 6 meeting, at 2:30, on the same day of the meeting between 12:03 and 12:33 p.m. Nevertheless, he proceeded to the volleyball practice area after school because his first responsibility was to the seventh grade students who would have been unsupervised, had he attended the meeting with Dr. Williams. Appellant testified that he did not have sufficient time to cancel the practice. While appellant's contention has some merit, the fact remains that he did not arrange for a substitute. Failing that he did not inform either Dr. Williams or Mr. Zech of his predicament before he left the school or after the practice as a courtesy, and more importantly to show his good faith that the reason he left for the scheduled practice was out of concern for the students. Professional responsibility and courtesy to the superintendent, as well as demonstration of good faith would have required appellant to contact the administrators before he left the building if possible, but certainly soon after he completed his practice. His failure to contact the administrators was sufficient proof that appellant intended to disobey Dr. Williams' directive. Appellee has, therefore, proven by the preponderance of the evidence that appellant engaged in an act of misconduct and insubordination through his failure to attend the March 6, 1995 meeting at 2:30. The March 6 meeting was a meeting that was postponed from March 1, 1995, and it was not

unreasonable for Dr. Williams to have expected appellant to attend that meeting.

Appellee had also charged appellant with misconduct and insubordination for leaving the school grounds on March 6, 1995, instead of attending the meeting with Dr. Williams. Appellant had taken his students to Sawyer-Highland Baptist Church after school for numerous times through March 6, 1995, for volleyball practice. Clearly he had permission to leave the school grounds and to go there. The board had charged appellant with misconduct and insubordination for not attending the March 6 meeting, which I have sustained. To charge appellant with insubordination for leaving the school to supervise students he had coached for quite a while at the same out-of-school location is to merely compound the charges. I find that appellant had a continuing authorization to take his students to Sawyer-Highland Baptist Church after school. There was no directive to specifically counter that authorization. Based on the evidence presented, I find that appellee has not proven this charge.

Charge 5 states appellant engaged in acts of insubordination and misconduct for failure to comply with Dr. Williams' April 27, 1995 oral directives and May 4, 1995 and May 24, 1995 written directive to provide Principal Degner or Principal Zech with his grade and lesson plan books. Appellant denied that he ever received an oral directive to leave the books with either principal. Also, there is no testimony that appellant received the above-stated letters before the two books were discovered. This testimony contradicts Dr. Williams' testimony. Appellant also testified that he left the books on his desk at his office. Neither Mr. Prince who shared an office with

appellant, nor Dr. Williams who looked for the books on the same day that he suspended appellant could find the books at appellant's office. Similarly, Mr. Zech, Mr. Degner and Dr. Williams could not find the books following several different days of searches. The books were found on May 30, 1995, in appellant's filing cabinet. (Exhibit 24). I find Dr. Williams' testimony that he had directed appellant to leave the books with either principal credible. Mr. Zech's testimony that, on April 27, 1995, Dr. Williams told him that he had instructed appellant to leave the books with either principal supported Dr. Williams' testimony. Conversely, I do not find credible appellant's testimony that he received no oral directive to leave the books with either principal or his testimony that he left the books on top of his desk. Therefore, I find that appellee has proven by the preponderance of the evidence that appellant engaged in misconduct and insubordination by failing to turn over the books to either principal.

Charge 6 cites appellant with insubordination and misconduct for failure to comply with the directive of the board to take physical and psychological examinations at the board's expense. Appellant is also charged for failure to choose one physician from each of the two sets of lists selected by the board, and for failure to inform the superintendent of the dates and times of the appointments. Appellant argues that this charge fails because appellee may not enforce through a tenure proceeding its own illegal directive, which it issued in violation of the Open Meetings Act, MCL 15.216, *et seq*; MSA 4.1800(11), *et seq*, and in violation of appellant's procedural due process rights. At the May 8, 1995 meeting, the board neither

identified the employee under consideration, nor the directive given to that employee. Appellant directly and through his attorney asked for an open meeting, and although the board ostensibly held an open meeting, it declined to identify the employee or the issue is was reviewing because it was considering a "personnel action". In 1982, a similar case involving the same school district was litigated. In *Palladium Publishing Co. v. River Valley School District*, 115 Mich App 490; 321 NW2d 705(1982), *lv den* 417 Mich 1049(1983) the board declined to disclose the names of suspended students in an open meeting. The Court of appeals held:

> It must follow that in order for the board of education to act upon a suspension of a student, the minutes of the board of education meeting must contain the student's name. The facts cannot be hidden by using the student's number.

Appellant further argues that appellee adopted its directive without providing appellant's constitutional right to due process. Thus, appellant asserts that the board was without legal authority to adopt its directive. The evidence here shows that although appellant received notice of the meeting, appellant was unaware of what the board had considered. Neither appellant nor his attorney was given an opportunity to present appellant's case before the board voted. Indeed, whatever comments the board chose to hear were slated to be heard after the board voted. In support of its case that the board did not provide appellant his due process rights and therefore the board's action was without legal authority, appellant cites *Moran v. Rapid City School District*, 281 NW2d 595, 599 (SD 1970) which states:

> Our state and federal constitutions, however, also impose procedural requirements and compliance with those requirements, in addition to the statutory requirements, is necessary for the school board's action to be legal. A violation of an individual's due process, equal protection, first amendment, or other rights guaranteed by our state or federal constitutions, even if there is full compliance with the statutory requirements, is grounds for a determination that the school board acted illegally and therefore its decision was illegal.

Appellant further contends that appellant was not afforded due process. At a minimum, appellant argues that the board should have given him an opportunity to present his side of the story before it deprived him of his property and liberty interests. The loss of continuing employment according to appellant is "deprivation of property" and he cites in support *Tomiak v. Hamtramck School District*, 426 Mich 678; 397 NW 2d 770, 779-780). Appellant argues that appellee's failure to provide appellant due process to protect his property right deprives the board's directive of legal validity and makes them void. Consequently, appellant asks the Commission to dismiss the charge.

Second, appellant contends that appellee's directive lacked any reasonable basis and, therefore, appellant could not be insubordinate for not complying with an unreasonable order. Appellant's argument here is that there was no reason to believe that appellant had a propensity for violence, the ostensible reason that the district asked appellant to take physical and psychological examinations. Appellant further contends that the material

provided to Dr. Onkka was biased, incomplete and selected to produce the desired result.

Finally, even assuming that the directive to submit to the physical and psychological examination was legitimate, appellant claims that his response of providing results of physical and psychological examinations from his doctors to the board was a reasonable response, though not a literal response and, thus, according to appellant any "technical" misconduct is excused.

Article IX, Section 1 (e) of the collective bargaining agreement between the union and the River Valley School District allows for such examinations. The collective bargaining agreement provision states:

> Upon the recommendation of the Superintendent, the Board may, at the Board's expense, require a teacher to submit a physical or mental examination by appropriate specialists to determine whether involuntary sick leave is warranted.

Dr. Wittrup, a psychologist, who was deposed at break during the week of the hearing, testified that based on the material presented to Dr. Onkka, there would be a question of concern about whether appellant had a propensity for violence and thus a recommendation for a personal evaluation was in order. (Dr. Wittrup's Deposition p 30). Based on the evidence presented, I find that appellee had a reasonable basis to require appellant to take physical and psychological examinations. This finding does not address the due process or the Open Meetings Act issues raised by appellant.

With respect to the alleged violation of the Open Meetings Act, appellee counters appellant's argument by stating that a decision of a public body made in an open meeting remains valid unless it is invalidated by a decision of the court under Section 10 of the Open Meetings Act. Appellant argues that commencement of an action in circuit court to invalidate a decision of a public body for violation of the Act must be brought within sixty days after the approval of the minutes are made available to the public by the public body. Since no such action was commenced, appellee asserts that the May 8, 1995 decision of the board remains valid. Therefore, according to appellee, the Commission lacks the jurisdiction to invalidate that decision.

Also, in response to appellant's due process and property rights contention pertaining to a physical and psychological examinations, appellee cites *Flynn v. Sandahl*, 58 F.3d 283 (7th Cir., 1995), as follows:

> But more fundamentally, we do not believe that the requirements of due process were ever triggered in this case. The principle that an employee with a property interest in his job is entitled to some type of a pretermination hearing rests on the assumption that his employer has taken some action to deprive him of his job . . . Yet there is absolutely nothing in the record before us suggesting that the order to take a psychiatric examination by itself was tantamount to a notice of termination which deprived Flynn of a property interest in his job. Nor, for that matter, is there anything to support the assertion that the results of the examination would have had an adverse effect upon Flynn's job status.
>
> (Citations omitted.)

Appellee also cites *Daury* v *Smith*, 842 F. 2d 9 (1st Cir., 1988), which referred to the court's decision in *Lyons* v *Sullivan*, 602 F. 2d 7 (1st Cir. 1979), *cert denied*, 444 U.S. 876, (1979) as follows:

> As *Lyons* implicitly recognizes, there is a legitimate public interest in providing a safe and healthy educational environment. A school committee, therefore, may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision.
>
> Viewing the evidence in the light most favorable to *Daury*, we find no violation of his constitutional rights in the school committee's requiring that Daury see a psychiatrist. The Committee simply sought a professional opinion to ensure that Daury would not, if he returned to work, jeopardize the school system's interest in providing a safe and healthy educational environment. See *Lyons*, 602 F. 2d at 10.

Appellee also refers to *Schaller* v *Board of Education of the School District of Ypsilanti* (94-3) in which the Commission upheld the discharge of a teacher for failure to comply with directives to take psychological testing. Appellee, therefore, asserts that appellant's refusal to comply with the directives of the board to take physical and psychological examinations is just and reasonable cause to discharge appellant.

Appellee is empowered through the collective bargaining agreement to require appellant to take the tests

under consideration. Appellant's efforts to provide the results of his own doctors' examinations to the president of the board fails for two reasons: First, the order to appellant to take the tests came from the superintendent, not from the president of the board. Therefore, he should have dealt with the superintendent. Second, submission of the test results from doctors outside the list was not compliance. If appellant had a problem with the list of doctors, it was incumbent on him to address his concerns to the superintendent and to grieve the process. I do not find appellant's actions of disregarding the superintendent's instruction to take the examinations with the selected physicians reasonable, nor do I find that substituting his own physicians' examination results was in compliance with the superintendent's instructions. Rather than appellant's action here being merely "technical" misconduct, it was actual misconduct and it was an act of insubordination. The appropriate action would have been to bring his concerns to the superintendent and take whatever appropriate action is necessary through the grievance process. To discard the superintendent's directive was insubordination.

The only legitimate issue I will consider, therefore, is the failure of the board to abide by the requirements of the Open Meetings Act and whether this failure is grounds to invalidate its decision issued in derogation of the Open Meetings Act. Appellee, as indicated earlier, argues that the Open Meetings Act noncompliance issue is outside the jurisdiction of the Commission. I do not agree. In *Viera* v *Saginaw Board of Education*, 91 Mich App

555; 283 NW2d 796 (1979), the Court held that the Commission is not without jurisdiction to discuss questions of law. It stated:

> Moreover, we see no reason why in the hearing before the State Tenure Commission plaintiff could not have attacked the validity of his dismissal by arguing the contract provision was illegal and hence failure to comply with it was not just and reasonable cause for dismissal. Merely because it involved a question of law did not preclude the State Tenure Commission from ruling upon it. In *Long* v *Board of Education Dist No. 1, Fractional, Royal Oak Twp & City of Oak Park*, 350 Mich 324; 86 NW2d 275 (1975), the Supreme Court stated that the commission has authority to decide "requisite questions of law." Where, as here, the sole reason for plaintiff's dismissal was his failure to comply with the agency shop provision, the question of whether that provision was legal was not outside the scope of the commission's jurisdiction. *Viera, supra*, p 560.

In considering whether there is just and reasonable cause to discharge appellant, the Commission has authority to consider ancillary matters of law. This being so, I will now consider whether appellee's action contravened the Open Meetings Act. The Act requires that all meetings of a public body shall be open to the public unless a closed session is voted on or the agency is excluded from the requirements of the Act. The Act also requires that all deliberations of a public body take place at a meeting open to the public unless it is excused by law. MCL 15.263(3)(1)(2)(7), 15.268; MSA 4.1800(13), MSA 4. 1800(18).

Despite both appellant's and his attorney's requests for an open meeting and their request for the identity of the employee who was the subject of the board's action, the board never divulged the employee's identity, and, it did not deliberate in public. Instead, the board reviewed the superintendent's recommendation in silence and voted to uphold his recommendation. The board's reasons for not disclosing the identity of the person and for refusing to answer the questions of the public was, as indicated earlier, because it was reviewing a personnel matter which was confidential. It is difficult to determine whose privacy was being protected when appellant requested an open meeting. In hiding behind the confidentiality issue, the board was engaging in subterfuge and acted in derogation of the Open Meetings Act. As stated earlier, the same board was admonished by the Court of Appeals for engaging in a similar conduct. I find that the board's action was deliberate.

The purpose of the Open Meetings Act is to promote openness and accountability in government. *Booth Newspapers, Inc.* v *University of Michigan Board of Regents*, 192 Mich App 574; 481 NW2d 778 (1992). The primary purpose served by the Open Meetings Act is to ensure that performance of necessary governmental functions is open to the public. *Board of Education of Rochester Community Schools* v *Michigan State Board of Education*, 104 Mich App 569; 305 NW2d 541 (1981). In the instant case, the board's meeting was open only in name; there was no discussion, no deliberation nor an opportunity afforded appellant to address the board and make his case. Based on a review of the video of the board's meetings and the testimony of

witnesses, the board did not deliberate in an open meeting and thus, it contravened both the letter and the spirit of the Act. Therefore, its decision at its May 8, 1995 meeting with respect to appellant is void *ab initio* and is without effect. Therefore, appellant could not have been insubordinate as to the directive issued by the board at the May 8, 1995 meeting.

In Charge 7, appellant is cited with an act of insubordination and misconduct for failure to arrange by June 23, 1995, to meet With Dr. Williams, as directed by a letter dated June 16, 1995. Dr. Williams' letter was posted on June 19, 1995. According to appellant's testimony and the postal receipt, appellant did not receive the June 16, 1995 letter until June 30, 1995, Dr. Williams' last day of work. There is no testimony that appellant could have received the letter earlier. Therefore, I find that this charge has no merit and find that appellant did not engage in insubordination and misconduct relative to Charge 7.

Charges 8 and 9 cite appellant with acts of misconduct and insubordination. Charge 8 specifically cites appellant with disruptive, abusive and intimidating behavior toward the board members and refusal to comply with the directives of the president of the board to cease his behavior at the board's January 23, 1995 meeting. Charge 9 cites appellant with threatening the president of the board by stating, "You'll be sorry for this," during the board's April 24, 1995 meeting, and threatening Mr. Scygiel, a board member, with the words, "You will regret this." Mr. Scygiel was standing in the hall outside the library where the board had just considered appellant's representation fee issue. Appellant disputed that he threatened either Mr. Zeiger or Mr. Scygiel.

Appellant further disputed that he uttered the words, "You'll be sorry for this" and "You will regret this." Since appellant's conduct, other than the two statements he made, is not part of the charges of the April 24 incidents, his other conduct at the above meeting is not relevant. Appellant's testimony as to these two remarks is inconsistent with the testimony of Mr. Zeiger, Mr. Damaske, Mr. Scygiel and Dr. Williams all of whom testified that appellant stated those words. Therefore, I do not find credible appellant's testimony that he did not utter these remarks.

Appellant contends that even if his two alleged threatening statements were true, they could not constitute insubordination as insubordination can only occur when an employee wilfully disobeys a reasonable directive of a supervisor that is directed to the employee's job duties or performance. Appellant cites *Morgan* v *Board of Education of Galesburg-Augusta Community Schools* (85-11) and *Flowers* v *Detroit Board of Education* (91-20). Appellant further maintains that charges 8 and 9 infringe upon appellant's statutory and constitutional rights of free speech and petition.

In response, appellee cities many Commission and federal decisions where an employee's speech concerned matters of personal interest, and the speech was deemed not protected by the First Amendment. *Sawin* v *Wexford-Missaukee ISD* (89-22). I agree with appellee that appellant's statements and actions were not protected under the statutory and constitutional rights of free speech or petition. In both cases, the board was considering appellant's issues and appellant participated to further his cause. His participation cannot be considered a matter of

public concern. Therefore, appellant's actions and remarks were not constitutionally protected matters.

Appellant argues that even if he were found to engage in the acts he was charged under Charges 8 and 9, appellee is required to prove adverse effect. I do not agree. This Commission has held in *Pounder* v *Harper Woods Public Schools* (74-5-2) that in teacher misconduct cases involving insubordination and other violation of rules and regulations adverse effect could be presumed. Thus, appellee is under no obligation to prove adverse effect.

Based on the evidence, I find that appellant's behavior and statements on the January 23, 1995, were inappropriate, unprofessional and disrespectful to the board and its members. I do not find his statements at the April 24, 1995 meeting or his statement in the hall to be threats. The evidence is clear that appellant had grieved the board's actions in the past and had sued the board and its individual members. Appellant had been vocal in his criticism of the board for what he considered were inappropriate actions. There is nothing in his outbursts to show that appellant meant anything other than he would take appropriate legitimate action. Although the statements were at best intemperate, they could not be construed as a personal threats to the members, nor were they tantamount to acts of insubordination, as the latter term is construed by the Commission.

Needless to say, the board in no small measure contributed to appellant's outbursts. Section II of the collective bargaining agreement which was the basis of the April 24, 1995 meeting, states a bargaining unit member

is entitled to due process before the board deducts representation fees. Clearly, the board did not provide appellant minimum due process. A "yes or no" answer about whether appellant had paid his representation fees could not constitute due process, specially when appellant, time and again, asked for a due process hearing. His comments of "Where are my accusers?", "Where are the allegations?" "I have paid what I am required to pay." "The matter is before an arbitrator" are all manifestations that he was insisting on his right of due process. Appellant was entitled to due process, which the board did not afford.

At the January 23, 1995 meeting, the board was considering its counsel's recommended decision in which the counsel acted as a hearing officer in several issues affecting appellant. While it is legal for counsel to act as the board's hearing officer, appellant questioned its ethical propriety. Here again, the board adopted its counsel's recommended decision without deliberation. Because of the perception of impropriety and the interest that many people who attended the meeting had in the case, deliberation would have been appropriate and would have alleviated some confusion.

Because of the board's actions, appellant's behavior, while inappropriate, was understandable. Consequently, while appellant has proven by the preponderance of the evidence charge 8, I find that the board's conduct in handling appellant's case was a mitigating factor. Therefore, while penalty short of discharge is appropriate, viewing all of the circumstances of this case, I do not find that there is just and reasonable cause to discharge appellant on charge 8 standing alone. Similarly, I do not find

appellee has proven just and reasonable cause to discharge appellant on charge 9.

Finally, in view of the discussions above, what penalty is appropriate to the proven charges of 3, 5, and 8 involving misconduct and insubordination? The Commission has defined insubordination as "wilful disobedience to a directive or policy by one fully understanding such a directive". *Davis* v *Grand Rapids Board of Education* (75-26). The Commission in *Tolliver* v *Carrollton Board of Education* stated, "[F]or a finding of insubordination the rule or directive must be reasonable and not arbitrarily applied. In *Sutherby* v *Gobles Board of Education* (73-53), a teacher was charged with (1) permitting students to engage in non-course related activities during class periods, (2) violations of professional conduct, (3) failure to follow board procedures and administrative directives in the dismissal of students from class, the use and control of a storage area, permitting the use of his room during lunch periods and the failure to provide supervision over students in his charge, and (4) violations of the master agreement. Here, the Commission held:

> We hold that a teacher who, after being warned, persists in violating the reasonable rules and regulations of a local controlling board, interfering with the proper operation and management of the school district, has engaged in conduct constituting just and reasonable cause for discharge . . . Reasonable and just cause for discharge is established by a controlling board when it has proven, by a preponderance of the evidence, that a teacher has been insubordinate, by having engaged in repeated willful violations of board or administrative rules and regulations.

Appellant's refusal to meet with Dr. Williams on March 6, 1995, was willful insubordination, as was his refusal to provide either principal with his plan and grade books before he left the school grounds on April 27, 1995. Similarly, his continued disruption of the board meetings on January 23, 1995, was misconduct and his refusal to heed Mr. Zeiger's directives was insubordination. Again, as stated earlier, these acts seen in isolation constitute reasonable and just cause to discharge appellant. However, viewed in their entirety, there is enough blame to be shared by both parties.

This case is one where appellant throughout his interaction with the board and the administration felt he was in the "right" and pursued his cause with zeal and righteous indignation, oblivious to the rights and responsibilities of the board and the administration. He felt that he would not receive justice from the board, and some of the board's actions including lack of due process and absence of deliberation in board meetings, supported and reinforced his opinion. Yet, a governmental body cannot function if citizens take it upon themselves to disrupt, engage in acts of insubordination and show lack of respect, as appellant did. Despite any failings by the board, it was incumbent upon appellant to challenge his actions through legal recourse, as appellant had done in the past, and not to engage in misconduct and insubordination to enforce his rights.

On balance, appellant's misconduct and insubordination is mitigated in part by appellee's conduct toward him. Viewing the entire circumstances, I find that suspension of appellant without pay, until the beginning of the 1997-98 school year, is justified.

ORDER

Based on the record, and for the above stated reasons:

IT IS HEREBY ORDERED that appellant shall be suspended from his job without pay until the beginning of the 1997-98 school year. It is further ordered that appellant shall be reinstated to his job on or immediately before the beginning of the first day of class of the 1997-98 school year.

Dated: March 4, 1996

/s/ Tessema Berga
Tessema Berga
Administrative Law Judge

APPENDIX

ATTACHMENT NO. 3

STATE OF MICHIGAN
STATE TENURE COMMISSION

RICHARD A. SULLIVAN,
Appellant

v Docket No. 95-25

RIVER VALLEY SCHOOL DISTRICT
BOARD OF EDUCATION,
Appellee

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DECISION AND ORDER

On March 4, 1996, Administrative Law Judge Tessema Berga (hereinafter ALJ) issued his Preliminary Decision and Order in the above-captioned case, finding that the appellee school board's recommended discharge of appellant was not justified, but that suspension of appellant without pay until the 1997-98 school year was warranted under the circumstances.

The ALJ dismissed on a motion for summary judgment two of the ten charges brought against the appellant, but allowed a separate record to be kept for appeal purposes. Regarding the remaining charges, the ALJ found that appellant's failure to attend a meeting to which he had been ordered by the superintendent, his failure to turn over his grade and lesson plan books when directed to do so, and his disregard for the superintendent's instruction to take physical and mental examinations with selected physicians amounted to misconduct and insubordination. However, the ALJ also found that the conduct of the appellee board was inappropriate in several respects, and that the board's actions mitigated appellant's misconduct and insubordination. Thus, on balance, the ALJ determined that suspension without pay until the 1997-98 school year was the only justifiable disciplinary action.

The Preliminary Decision and Order was served on the parties in accord with Article IV, sec. 4(5)(I) of the Teachers' Tenure Act. MCL 38.71 *et seq.*; MSA 15.1971 *et seq.* On March 25, 1996, both appellant and appellee filed exceptions to the ALJ's decision. On April 4, 1996, appellant filed cross-exceptions and a brief in response to appellee's exceptions, and appellee filed its brief in support of the Preliminary Decision and Order with respect to four of the charges.

We have reviewed the exceptions in light of the whole record, including briefs filed by both parties. We modify the Preliminary Decision as to Charges 1, 3, 6, 9, and 10, and issue a different Order of suspension for the reasons set forth below.

I. DISMISSAL OF CHARGES 1 AND 10

On July 24, 1995, the River Valley School District Board of Education affirmed appellant's suspension and voted to proceed with the ten charges that had been filed by the superintendent, Dr. Charles O. Williams, on April 27, 1995. (See Exhibit 2). The ALJ dismissed Charges No. 1 and No 10, granting in part appellant's motion for summary judgment.

Charge 1 involved a letter that appellant sent to the Student Congress President regarding the rules of a student congress-sponsored event. Charge 10 was based upon appellant's alleged refusal to sign documents. The ALJ found that by writing the letter, appellant was "exercising his constitutional right of free speech[,]" and that, in the case of Charge 10, appellant's conduct was "innocuous and could not, in any way, have been an obstacle to the evaluation process." (Preliminary Decision and Order, p 4). A separate record regarding these two charges was kept for purposes of review by this Commission.

A. Charge 1:

We turn first to the constitutional claim. Appellant maintained, and the ALJ agreed, that dismissal of Charge 1 was required because it represented an impermissible infringement on the appellant's freedom of speech, as guaranteed by the U.S. Constitution, Amendments I and XIV, and by the 1963 Michigan Constitution, Article I, sec 5.

Charge 1 provided that appellant had

> "exercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks." (Exhibit 2, p 1).

The issue turns on whether this communication[1] may be characterized as constitutionally protected speech, thus requiring a balancing of appellant's constitutional interests with the school district's asserted purpose in discharging the appellant on the basis of the speech in question. If appellant's speech is not protected, no such

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[1] The text of the letter reads as follows,

"Dear Danny,

Recently a member of the student congress 'Strobe light volleyball committee' approached me and asked me to withdraw my team from your tournament scheduled for February 9, 1995. Apparently this student was told by your faculty sponsor to ask me to remove my team because she thought playing us wouldn't be fair. Needless to say I and my teammates are very offended by this action.

Please be advised that I am withdrawing my team under protest. I and my teammates would not be able to play at our full potential under this cloud that your committee has created. Spirit week has crushed our spirits and has raised some serious questions in our mind concerning fair play, truth, honesty, nobility and whether these qualities even exist within this organization.

Has the student congress become a student Kongress [sic] with a dictator?"

balancing is necessary. *Connick v Meyers*, 461 U.S. 137, 146; 103 S Ct 1684, 1690 (1982).

Although inquiry into the protected status of speech is a question of law, the *Connick* test requires scrutiny of the "content, form, and context of a given statement, as revealed by the whole record." *Id*, p 147. In this case, we cannot say that appellant's views about the rulemaking procedure for the strobe light volleyball tournament amounted to speech regarding an issue of public concern.

In order to trigger First Amendment protection, "the speaker must have spoken *predominantly* 'as a citizen[,]' " *Dodds v Childers*, 933 F2d 271, 274 (5th Cir, 1991), about "broad social issues[.]" *Sanguiani v Pittsburgh Bd of Pub Ed*, 968 F2d 393 (3d Cir 1992). Like the teachers in *Dodds, supra; Sanguiani, supra; Choate v School District of Niles Comm Schls*, Docket No 160082 (Unpublished, Mich App 1996); *Dorsett v Board of Trustees for State Colleges & Universities*, 940 F2d 121, 124 (5th Cir, 1991); and in *Cliff v Board of School Commissioners of the City of Indianapolis*, 42 F3d 403, 411 (7th Cir, 1994); and *Sawin v Wexford-Missaukee Intermediate School District* (89-22, p 13), appellant was speaking about a matter of private, rather than public, interest.

The volleyball tournament was a school function (Separate Record, p 42), not a community event. Appellant's letter to the Student Congress President expressed his personal frustration with the exclusion of his team from the tournament. Although appellant questioned whether the qualities of "fair play, truth, honesty, [and] nobility" were reflected in the actions of the student congress, his comments were motivated primarily by

appellant's personal interest in informing the Student Congress President about "what happened in [appellant's] situation . . . " (*Id.* p 208). The form of appellant's communication was a private letter to a student, and appellant, himself, characterized the letter as "tongue in cheek," rather than serious commentary on an issue of public interest. (*Id,* p 209). Therefore, his speech was not entitled to constitutional protection and we reverse the finding of the ALJ on this point.

However, as a tenured teacher, appellant is entitled to protection beyond that available in the U.S. and Michigan Constitutions. Article IV of the Teacher Tenure Act permits discipline of a tenured teacher only for "reasonable and just cause." MCL 38.101; MSA 15.2001. Numerous Commission decisions have elucidated the meaning of "unprofessional conduct" that amounts to reasonable and just cause for discharge. Such conduct includes: using vulgar language in the classroom or making racially derogatory and sexually demeaning comments to students,[2] engaging in sexual misconduct or romantic relationships with students,[3] misconduct

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[2] *Stewart v Lake City Area Schools* (78-35); *Knopf v Flint Board of Education* (78-41); *Leizerman v Wyandotte School District* (89-4).

[3] *Knopf, supra; Sweeney v Bloomfield Hills School District* (81-68); *Reggio v Anchor Bay Board of Education* (76-46); *Tolliver v Carrollton Board of Education* (76-37); *Shimon v Flint Board of Education* (82-2); *Heemstra v Bay City School District* (73-61-R); *Mabry v Wyoming Public Schools* (79-30) and (83-21); *Clark v Ann Arbor Public Schools* (78-15), *aff'd, Clark v Ann Arbor School District,* 130 Mich App 681; 344 NW2d 48 (1983); *Smith v Detroit Board of Education* (84-55) and (85-1).

involving illegal drugs or alcohol,[4] bringing a gun to school,[5] involving students in the misappropriation of school property,[6] and personally profiting from school-sponsored field trips for which students were directly solicited at school.[7]

Some, but not all, charges of misconduct or unprofessional conduct must be supported by a showing of the adverse effects of such conduct on students or on the educational process. *Miller v Grand Haven Board of Ed*, 151 Mich App 412, 420; 390 NW2d 255 (1986); *see Clark, supra*, pp 686-688, discussing *Beebee v Haslett Public Schools*, 66 Mich App 718; 239 NW2d 7245 (1976), and *Beebee v Haslett Public Schools (After Remand)*, 406 Mich 224; 278 NW2d 37 1979). As observed by the *Miller* court, discipline of a teacher because of certain types of conduct would be difficult to justify in the absence of a showing of adverse effect.

For example, when a school district has premised the disciplining of a teacher on a difference of opinion regarding pedagogical or personal philosophies, a showing of adverse effect is required. See *Detroit Board of Education v Parks*, 417 Mich 268; 335 NW2d 641 (1983). Likewise, when discipline rests upon a teacher's conduct

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[4] *Dennis v Flint Board of Education* (77-11); *Zarend v Oscoda Area Schools* (67-13); *Nolte v Port Huron Area Schools*, 152 Mich App 637 (1986).

[5] *Streeter v River Rouge Board of Education* (78-34).

[6] *Creelman v Grosse Pointe Public Schools* (81-15); *Bever v Bangor Public Schools* (76-34); *Cristan v West Iron County School District* (73-63).

[7] *Carter v Howell Public Schools* (89-29).

outside of school and not involving students, a showing of adverse effect may be necessary.

On the other hand, "where a teacher's misconduct occurs on school grounds during school hours, or otherwise involves students, *and is obviously inappropriate,* disciplinary action may be taken without a pleading or showing of adverse effect." *Miller, supra,* p 421 (emphasis added). The charges in *Miller* involved sexual misconduct, and, as in many of the cases cited *supra,* involving patently inappropriate behavior, a demonstration of the negative effect on students and the educational environment was unnecessary to justify the imposition of discipline. Likewise in *Sironen v Kent City Community Schools* (88-8), which involved romantic conduct toward a student, we found that because appellant's conduct was unquestionably "inappropriate and went beyond the bounds of a proper teacher/pupil relationship[,]" the school district was not required to show adverse effect. *Id,* pp 6-7.

In its first exception to the Preliminary Decision and Order in this case, appellee maintains that appellant's letter to the student congress president constituted poor professional judgment and misconduct sufficient to substantiate reasonable and just cause for appellant's discharge. In addition, appellee argues that the letter caused adverse effects to the recipient of the letter as well as to other student congress members and to the faculty advisor to the student congress.

On its face, the act of sending the letter is not "obviously inappropriate," as was the conduct in *Miller, supra.*

The student congress had a policy of encouraging persons with questions about events to communicate their inquiries directly to student congress members. (Separate Record, pp 32, 44). We find no impropriety in appellant's decision to send a letter informing the Student Congress President about an allegedly unfair decision that appellant believed had been made outside the normal decision making procedures of the student congress. Although the tone of this letter was cynical and critical, there was no use of inappropriate or personally insulting language that would be evidence of patently unprofessional behavior.[8] This letter represents one instance of poor judgment; it was not shown to be part of a pattern of such communications.

Thus, we find it necessary to turn to appellee's allegations of adverse effect to provide sufficient justification for a claim that this charge represents just and reasonable cause for appellant's discharge. Appellee maintains that the student recipient of the letter, students who listened to a reading of the letter, and the teacher who was alluded to in the letter were all adversely affected. However, we find that the testimony of the concerned individuals provides only minimal support for this claim.

The student recipient of the letter testified that "it was kind of upsetting, I mean, but I got over it[,]" (*Id*, p 16), and that he "didn't expect to receive this from a teacher," (*Id*, p 18). He also stated that the letter had no

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[8] We find that appellee's use of the adjective "contemptuous" to describe appellant's remarks is a somewhat inaccurate characterization of the tone of the letter. (See Exhibit 2, p 1).

effect on his overall positive relationship with the appellant. (*Id*, p 25). In addition, the student testified that, while some members of the student congress were "upset about what was said in the letter," others felt that it was "no big deal." (*Id*, p 21). The student congress discussed the letter at one of its meetings, (*Id*, pp 38-39), and decided to take no formal action. (*Id*, p 42). The issue was "basically dropped" (*Id*), and the tournament occurred as scheduled. (*Id; see Id*, p 51).

The faculty advisor to the student congress, Mary Sullivan, expressed her opinion that the letter in question was "ridiculous," (*Id*, p 74), that "it was a joke[,]" (*Id*, p 100), and that it was not "the way a teacher would resolve a conflict with an organization, especially of students." (*Id*, pp 74-75). She expressed her opinion that, as a result of the letter, students lost respect for teachers, generally, (*Id*, p 81); however, that belief was not substantiated by any direct testimony in the record.

Thus, we find that Ms. Sullivan's testimony represents evidence of a difference of opinion regarding the professional propriety of direct teacher-student communications of this nature. Such philosophical differences may not form the basis for disciplining tenured teachers in the absence of a showing of adverse effect. *See Parks, supra*. To conclude otherwise would undermine one of the major purposes of the teacher tenure system: the maintenance of "an adequate and competent teaching staff, free from political and personal arbitrary interference." *Rehberg v Ecorse School District*, 330 Mich 541, 545; 48

NW2d 142, 144 (1951) (citation omitted). Since only minimal adverse effect to students was shown here, we conclude this record only established grounds for the mildest of rebukes for this behavior.

B. Charge 10

Charge 10 accused appellant of

> "engag[ing] in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995." (Exhibit 2, p 3).

The ALJ dismissed this charge because the alleged behavior was "innocuous" and posed no "obstacle to the evaluation process." (Preliminary Decision and Order, p 4). He further noted that it was appellant's "right not to sign[,]" and that other means were available to achieve the purpose of the signature. (Separate Record, p 120). We agree with the ALJ that the alleged behavior amounts to neither misconduct nor insubordination sufficient to support a just and reasonable cause for discharge.

The allegations in Charge 10 revolve around two meetings, attended by appellant; Mr. Degner, the principal of River Valley High School; and Mr. Zech, principal of the middle school. All three individuals testified as part of the Separate Record.

The first meeting occurred on March 24, 1995, for the purpose of delivering and discussing with appellant a final evaluation document that had been prepared by Mr.

Degner and Mr. Zech after a series of classroom observations. (Exhibit II). In that "Classroom Observation Report," with the exception of one comment related to appellant's use of objectives in his weight training class[9], appellant was rated "Satisfactory" or improved in all areas related to classroom performance.[10] The only negative comments relate to appellant's philosophical differences with the "upper" administration,[11] and to the letter that formed the basis for Charge 1, discussed *supra*.[12] On

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[9] This rating was the only "unsatisfactory" out of approximately 33 categories on the form that did not relate to differences with the upper administration. The principals had rated appellant as "satisfactory" or "improvement noted" on all other points.

[10] Appellant had also been rated "satisfactory" for the 1992-93 school year. (Separate Record, p 160; Exhibit XI).

[11] These comments included:

"On going MEA and occasional individual staff conflicts have isolated Mr. Sullivan. . . . Difference[sic] of opinion have caused conflicts. . . . It is a concern that on going conflicts with MEA, Upper Administration, and other staff has[sic] dominated Mr. Sullivans[sic] focus at River Valley, taking energy away from his teaching affectiveness[sic]. Mr. Sullivan must explore other means of conflict resolution." (Exhibit II, p 1).

"Has refused to follow directions given by Upper Administration. . . . Although Mr. Sullivan has shown improved openess[sic] to recent administrative suggestions, improvement is needed in responding positively to administration directions." (*Id*, p 3).

[12] Under the category "Personal Attributes," a comment appears under "shows good judgment, tact": "Letter written to student not professional choice[.]" After the typewritten comment, the name "Mary" is handwritten in. Mr. Degner testified that this was a reference to Mary Sullivan, the advisor to the student congress. (*Id*, p 3).

the basis of the alleged problems with the upper administration – which were brought to the attention of the principals by the superintendent, Dr. Williams (Separate Record, p 185) – the evaluation form recommended that appellant be put on an Individualized Development Plan (IDP).[13] Because appellant was concerned that certain comments on the form lacked documentation[14] (*Id*, pp 137, 219), he requested an opportunity at the meeting to insert his own comments in the space on the form for "Comments by Teacher." (*Id*, p 220). When that opportunity was denied,[15] appellant declined to sign the form.

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[13] The final category listed on the evaluation form is "Overall Effectiveness." Under "Comments by Principal," the following appears:

"Mr. Sullivan has shown willingness to comply with recent administrative imput[sic]. However, he still must improve human relations skills within the district. Consequently, an IDP will be planned between Mr. Sullivan and the HS/MS Administrators following Spring Break." (*Id*, p 3).

[14] *See* notes 11 and 12, *supra*. Appellant testified that he wanted

"verification that these issues that were written as part of my evaluation, first of all, actually were observed or evaluated because it's an observation evaluation. And I wanted to be able to see when these situations happened, if they were even referring to the '94-'95 school year."

[15] Mr. Zech testified that appellant was told at the meeting that he would be allowed to make comments later:

"Mr. Sullivan was concerned about not having an opportunity to write in regards to this. At that time we told him that we would provide opportunity for him to do that." (Separate Record, p 175).

"We were running on a short time line, the coordination of the two principals . . . we found that the coordination of time

The principals explained several times that appellant's signature only served to acknowledge his receipt of the document[16] (*Id*, pp 138-39, 141-42, 176), then eventually "acquiesced to th[e] fact" that appellant was declining to sign (*Id*, p 139 Mr. Degner), and noted on the document that appellant "needs documentation before signing." (Exhibit II, p 3.)

The second meeting took place on April 17, 1995, and involved the IDP (Exhibit III), which the same two principals presented to appellant. Appellant did not have any comments about the IDP at that meeting (Separate Record, pp 164, 180, 224), and it concluded with an expression of intent to continue the discussion. (*Id*, p 165). The development of the IDP was still in process at the end of that meeting. (*Id*, p 194).

Our discussion of misconduct in regard to Charge 1 is equally applicable to the conduct alleged in Charge 10. On its face, failure to sign an evaluation and IDP is not misconduct. No adverse effects stemming from this lack of acknowledgment of the documents have been alleged,

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became a little bit more difficult than what we anticipated." (*Id*, p 178).

"[A]nd [we] said, 'Look, if you want to make comments, we understand that, you're going to be allowed to make those comments. We want you to take receipt of this document.' " (*Id*, pp 189-190).

[16] The words "Reviewed by" appear adjacent to the place for the teacher's signature on the form. In addition, the following "NOTE" appears:

"Signature of teacher acknowledges receipt and review of this document by Teacher but does not indicate agreement with its content unless otherwise stated by Teacher." (Exhibit II, p 3).

nor are any plausible, since appellant has never denied his receipt of the documents. (*Id*, pp 157, 198).

It is possible that appellant's alleged refusal to sign the evaluation and IDP amounted to insubordination. We have defined insubordination as a "willful disobedience to a directive or policy by one fully understanding such directive or policy." *Davis v Grand Rapids Board of Education* (75-26, p 3). In addition, the rule or directive must be "reasonable and not arbitrarily applied." *Tolliver v Carrollton Board of Education* (76-37, p 8).

Thus, the first question is whether the behavior alleged in Charge 10 amounted to a willful violation of a directive or policy of which the appellant was fully apprised. There was no contract or board policy or rule requiring appellant to acknowledge the documents in question. (Separate Record, pp 168-69, 186). Although it may have been customary for most teachers to sign evaluations (*Id*, pp 141, 177-78), appellee has presented no evidence of any requirement that teachers sign them. In addition, there was no directive regarding the signing of the documents ever issued to appellant by either of the two principals who were in attendance at the meetings when appellant might have signed them. (*Id*, pp 155, 191, 221, 225). Indeed, neither Mr. Degner nor Mr. Zech recalled even requesting appellant to sign the IDP and the IDP form contained no space for a teacher signature. (*Id*, pp 143, 163, 164, 195; *See* Exhibit XI; Separate Record, pp 163-164). Therefore, there has been no showing of willful disobedience to a directive.

We conclude that appellee has not shown by a preponderance of the evidence that the behavior alleged in

Charge 10 supports a finding of just and reasonable cause for discipline. We find neither misconduct nor insubordination, and therefore, Charge 10 is dismissed.

II. CHARGE 2

Appellee's second exception provides that the ALJ improperly dismissed Charge 2. Appellant agrees with the ALJ's disposition of Charge 2, but advances additional reasons for its dismissal. Charge 2 accuses appellant of

> "exercis[ing] poor professional judgment and engag[ing] in misconduct, on or about February 6, 1995, by disclosing confidential student record information about the grade of one of his students, . . . " (Exhibit 2, pp 1-2).

The ALJ found that "there was no proof that appellant was responsible for disclosing the [confidential] information[,]" and that no misconduct had been proven. (Preliminary Decision and Order, p 19).

Appellee maintains in its exception that appellant's misconduct is based on his alleged violation of the school district Policy No. 5125, which states that "[n]o records, filed or data *directly relating* to an individual student shall be made available to anyone without the consent and notification of the student" or his or her parents or guardian. (Exhibit 17 (emphasis added)). Appellant counters that the record supports his contention, and the ALJ's finding, that he released no information to the public that may be characterized as "confidential" or as "directly relating" to the individual student in question.

The alleged confidential information at issue here was a letter that appellant had prepared to present to the Board of Education at its February 6, 1995, meeting. The letter outlined appellant's objections to the format and outcome of a grade change hearing that had recently been held under the auspices of the Board.[17] The Board was to vote that evening, in a closed session, on appellant's appeal of the grade panel's recommendation. Since appellant was the teacher who originally gave the grade in question, the letter reiterated appellant's reasoning and rationale for the grade, his dismay at not having been informed earlier of the request for the grade change, and his concerns, generally, that the recommendation to raise the grade from a D- to a B was sending an inappropriate message to students. (See Exhibit 13).[18] Additionally, it outlined some of the specific circumstances surrounding the grade change request, without mentioning the names of the student or his parents.

When appellant left the board meeting, he handed copies of the letter to at least two reporters who were waiting outside.[19] One of the reporters, Lynn Stevens,

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[17] The student's mother initiated the grade change panel, which was comprised of "three union members that [were] selected by the union; . . . the superintendent . . . and a board member selected by the board." (Tr Vol 3, p 22).

[18] The student in question was a football player. In the letter, appellant protested the teacher representation on the panel – "3 football coaches" – as well as the union's prior notice of the request. (Exhibit 13, p 1).

[19] Appellant testified that he handed the copies of the letter to two reporters, neither of whom were Lynn Stevens. (Tr Vol 9, p 111). Ms. Stevens testified that she could not remember specifically who handed her the copy of the letter. (Tr Vol 5, p 223).

utilized the information in the letter as the basis for a newspaper article. (Exhibit 11; see Tr Vol 5, p 225). That article indicated that "neither Superintendent Charles Williams nor teacher Rich Sullivan would release the names of the protesting student and his mother." (Exhibit 11). Ms. Stevens also testified that she asked appellant on two subsequent occasions for the name of the student, and he refused to divulge it. (Tr Vol 5, pp 225, 227).

Ms. Stevens eventually discovered the identity of the student through an anonymous telephone tip,[20] and then followed up with another article (Exhibit 12) after speaking with the student himself over the telephone. (Tr Vol 5, pp 232-233). It was in the second article that the student's name was mentioned. Ms. Stevens testified that appellant's letter did not provide enough information to identify the student, and that, without the telephone tip, she "would not have had any idea where to go looking." (Tr Vol 5, p 246).

Considering the record as a whole, we cannot conclude that appellant violated the policy in question. While it is clear that appellant made "data" about a student "available" to persons other than those authorized under the policy, that data was not "directly relat[ed] to an individual student[.]" (See Exhibit 17). Appellant, in fact, refused, on several occasions to release the student's identity. Thus, we find no violation of the policy and no obvious misconduct in the appellant's actions.

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[20] (Tr Vol 5, pp 228-229). Ms Stevens was sure that the telephone tip on her answering machine did not come from appellant, or any adult male. (*Id*, p 230).

As noted above in the discussion of Charge 1, conduct that is not obviously inappropriate will need the additional support of a showing of adverse effect in order to qualify as a basis for a finding of just and reasonable cause to discharge. Appellee maintains that no adverse effect need be proven, citing our decision in *Carter* v *Howell Public Schools* (89-29). However, *Carter* is highly distinguishable from the situation at issue here. The teacher in *Carter* had been deriving personal profit from arranging school-sponsored field trips. The teacher's conduct was "obviously inappropriate" and involved "teacher misconduct in the school or involving students. . . . " *Id.* p 8.

Appellee in this case has demonstrated neither adverse effect nor a sufficient connection between appellant's conduct and the effects suffered by the student in question. The student testified that his friends "kidded" him somewhat as a result of learning about the grade change, but that he "just blew it off. No big deal." (Tr Vol 6, p 300. *See also id,* p 304). Although the mother of the student in question testified that she was "shocked," when she learned of the newspaper article, it was the fact that her son's name appeared in the second article that was the source of her feelings. (Tr Vol 6, pp 270, 286). The student, also, identified the article in which his name appeared as the one that he had seen.

As noted above, the reporter was not able to use appellant's letter to determine the student's name for purposes of writing the second article. Therefore, even if some small adverse effect may have flowed from the

publication of the second article, appellee has not established a sufficient connection between appellant's conduct and the appearance of the student's name in the second article. Thus, appellee has not met its burden of proving that Charge 2 supports a finding of just and reasonable cause to discharge appellant. Charge 2 was properly dismissed.

III. CHARGES NO 3 AND NO 4

Charges 3 and 4 stem from appellant's failure to attend a meeting that was rescheduled by the superintendent on March 6, 1995, at 2:30. Charge 3 alleges misconduct and insubordination for failure to attend the meeting, and Charge 4 alleges misconduct and insubordination for leaving the school building instead of attending the meeting. Appellee's third exception takes issue with the ALJ's dismissal of Charge 4, and appellant's first exception challenges the ALJ's upholding of Charge 3. Appellant also cites, in his sixth exception and in his response to appellee's exceptions, additional reasons supporting the dismissal of Charge 4.

The ALJ sustained Charge 3, finding that professional responsibility and courtesy were breached by appellant's failure to arrange for a substitute and his failure to inform the administrators of his inability to attend the meeting. These lapses showed appellant's intent to disobey the superintendent's directive. (Preliminary Decision and Order, pp 19-20). The ALJ's dismissal of Charge 4 was premised both upon the fact that appellant had continuing authorization to leave the building at the time in question and on the notion that this allegation was

superplusage. (*Id*, pp 20-21). We consider the two charges together, as they involve the same set of facts.

The meeting in question was originally scheduled for March 1, 1995, at 2:30 p.m. and communicated to appellant in a letter from the superintendent, Dr. Williams. The meeting was convened to discuss appellant's letter to the student congress president. (Tr Vol 2, p 64; See Exhibit 8). The March 1 meting was canceled, and Dr. Williams rescheduled the meeting for March 6, 1995, at 2:30. He informed appellant of the change by placing a letter (Exhibit 10) in appellant's school mailbox. (Tr Vol 2, p 70). Appellant did not receive the letter until 12:32 on March 6, 1995, the day of the meeting. (*Id*, Vol 9, p 134). The letter informed appellant that "[f]ailure to report as directed will subject you to disciplinary action for insubordination." (*Id*.) Ms. Mostosky, appellant's representative, was also informed of the meeting during the late morning of March 6, 1995. (*Id*, Vol 7, p 58). During appellant's last class of the day, Mr. Magley, the president of the teachers' association, came into appellant's classroom and informed him that Ms. Mostosky would be there at 2:30. Appellant made no response. (*Id*, Vol 5, p 89).

Appellant testified that he did not attend the meeting because he was the sole adult responsible for the seventh grade girls' volleyball team that was scheduled to practice at 2:30 on that same day at a nearby church. (*Id*, Vol 8, p 107). The team members would take a bus to the church following the end of school. (*Id*, Vol 7, p 177). Appellant testified that it was necessary for him to leave the school grounds immediately after his last class, at 2:10, in order to arrive at the church in time to have everything ready for practice. (*Id*, p 106). He also indicated that canceling

the practice late in the day would not have been workable, since the girls' parents or relatives picked them up at the church when practice was over, and contacting them all would have been difficult. (*Id*, p 111). Testimony also revealed that appellant had continuous teaching assignments from the time he received notice of the meeting until 2:10, with a total of six to eight minutes "passing time" in between classes. (Tr, Vol 9, p 134). Ms. Mostosky arrived at the school at 2:10 or 2:15. (*Id*, Tr Vol 7, p 59). When appellant did not arrive for the meeting, she requested of Dr. Williams that the meeting be rescheduled. Dr. Williams was unwilling to reschedule the meeting. (*Id*, p 62; Tr Vol 2, p 77).

This record fully supports appellant's concern that the notice of the meeting came very late. The six to eight minutes of free time that the appellant had between 12:32 and 2:10 was hardly sufficient to provide adequate notice to the bus drivers, the team members, and their families. Moreover, the administration offered no assistance in finding a substitute for appellant's classes during the school day so that he could make other arrangements for the practice, or for the practice itself, of which the two principals were aware.[21] Given the timing of the notice, appellant's afternoon teaching schedule, and the unusual arrangements associated with the volleyball practice, which were fully authorized by the administration, does

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[21] By contrast, the first letter from Dr. Williams, setting up the March 1 meeting, provided that "any school obligation on this date and at this time will be covered by other personnel." (Exhibit 8). Had the administration actually provided backup support of this nature on March 6, and communicated it to appellant, its directive would have been reasonable.

appellant's decision to attend the practice rather than the meeting amount to insubordination? We think not.

As noted above in Part I, insubordination is a willful violation of a reasonable administration directive or policy of which the appellant was fully apprised. *Davis, supra; Tolliver, supra.* While the fact of disobedience is clear, here the reasonableness of the directive is not so apparent.

We are persuaded by appellant's argument that the directive in this case was not reasonable. The lateness of the notice made it all but impossible for appellant to comply without compromising his obligations as a teacher and coach to insure adequate supervision of his pupils. As we noted in *Tolliver, supra,* p 9, an administration directive should not ask a teacher to act against the interests of his students. Insubordination is not established for either charge 3 or 4 on this record.

Nevertheless, we agree with the ALJ that "professional responsibility and courtesy" required appellant to communicate his decision not to attend to the other meeting participants before he left the building. While the limited time available excuses appellant's failure to cancel the volleyball practice, appellant had a fully sufficient opportunity to send this message when Mr. Magley spoke to him during appellant's last class. That appellant did not do so shows a lack of regard for the others and poor professional judgment. Clearly, since the meeting was pointless without appellant's presence, appellant's discourtesy inconvenienced the administrators and the union representatives who had arranged to be present. Accordingly, this record establishes that appellant's lapse

created some level of adverse effect. As such, we must conclude that some misconduct was shown here. We will weigh this behavior in determining the penalty to be fashioned in this case.

IV. CHARGE 6

Appellee's sixth exception challenges the ALJ's dismissal of Charge 6. In his seventh exception, and in his reply to appellee's exceptions, appellant supports the preliminary disposition of Charge 6, but suggests two additional grounds for its dismissal.

Charge 6 accuses appellant of insubordination and misconduct for failing to comply with a Board of Education directive adopted at its May 8, 1995, meeting, and with subsequent related directives issued by Superintendent Williams. The May 8 directive ordered appellant, pursuant to the collective bargaining agreement, to submit to physical and mental examinations at the Board's expense. Appellant was supplied with a list of doctors who were authorized by the board to perform the examinations. The ALJ found appellee's directive to be reasonable (Preliminary Decision and Order, p 25), but found that, in issuing the directive in the manner it did, "the board was engaging in subterfuge and acted in derogation of the Open Meetings Act." (*Id*, p 30). The ALJ found that violation of the Act rendered the board's May 8 decision void *ab initio* and without effect; he therefore dismissed Charge 6.

Appellee argues that the board did not violate the Open Meetings Act, MCL 15.263(3)(1)(2)(7), 15.268; MSA 4.1800(13), 4.1800(18) (hereinafter the OMA), at its May 8

meeting. Alternatively, appellee maintains that, even if the OMA was violated, the Commission has no jurisdiction to decide the issue. Appellee reasons that only the Circuit Court may render such a decision, and only if a challenge is filed in that court within 60 days after the publication of the minutes of the allegedly violative meeting. See MCL 15.270(3)(b); MSA 4.1800(20)(3)(b). Since no such suit was filed, appellee maintains that the directive was and remains valid, and that Charge 6 was thus improperly dismissed.

Appellant counters, in its response to appellee's exceptions, that a consideration of the OMA in this case is necessitated by this Commission's responsibility to determine the reasonableness of any directive that provides the basis for a discharge of a tenured teacher for insubordination. Appellant asserts that illegal or unreasonable conduct by a controlling board may not constitute reasonable and just cause for discharge. Appellant notes that it is not seeking to invalidate appellee's action as a circuit court might do under the OMA, but rather, he raises the violation of the OMA as a defense to tenure charges that are based on an illegal directive. Appellant then offers numerous reasons why the May 8 meeting violated both the letter and spirit of the OMA, maintaining that the meeting was "open" in name only.

Appellant further argues that the directive in Charge 6 was invalid for two additional reasons. First, appellant argues that the May 8 directive violated appellant's rights of due process under the U.S. and Michigan Constitutions. Second, appellant maintains that the May 8 directive was unreasonable and arbitrary in that it was

premised upon biased and misleading information provided to the board by Dr. Williams.

We consider first the due process question. The U.S. and Michigan Constitutions guarantee that a person shall not be deprived of "life, liberty or property without due process of law." As with the First Amendment issue discussed above under Charge 1, there is a threshold question to be answered before we may consider whether the requirements of due process were met: Did this decision by the board deprive appellant of a property interest? We agree with the ALJ that the reasoning of *Flynn* v *Sandahl*, 58 F3d 283 (7th Cir, 1995), applies. In that case, the court found that the order to take a psychiatric examination by itself did not amount to a notice of termination which deprived the employee of a property interest in his job.

In this case, also, the directive to submit to involuntary physical and psychiatric examinations did not deprive appellant of a property interest. According to the applicable collective bargaining agreement, such exams are strictly for the purpose of "determin[ing] whether involuntary sick leave is warranted." Article V, Section 2 of the Teachers' Tenure Act permits a controlling board to order a leave of absence for a teacher because of physical or mental disability, and requires, at that time, a hearing for any such involuntary leave of absence. MCL 38.112; MSA 15.2012. Thus, appellee was not required to offer appellant a full due process hearing at its May 8 meeting.

Next, we turn to the jurisdictional question. It is true, as we stated in *Surath* v *Saginaw Public Schools* (91-17, p

4), that "[o]ur jurisdiction is limited to questions traditionally arising under the Teachers' Tenure Act. *Rockwell* v *Board of Education of the School District of Crestwood*, 393 Mich 616; 227 NW2d 736 (1975), [. . . and that] the Open Meetings Act itself provides for its enforcement through the circuit court. MCL 15.271; MSA 4.1800(21)." However, the fact that the OMA provides a specific mechanism for its enforcement does not preclude us from considering violations of its statutory provisions as long as such considerations are within the context of a "reasonable and just cause" determination. As the ALJ correctly stated: "In considering whether there is just and reasonable cause to discharge appellant, the Commission has authority to consider ancillary matters of law." (Preliminary Decision and Order, p 29). See *Long* v. *Board of Education*, 350 Mich 324, 326; 86 NW2d 275, 276 (1957); *Viera* v *Saginaw Board of Education*, 91 Mich App 555, 560; 283 NW2d 796 (1979); *Barrow* v *Portage Public Schools* (93-38, p 3).

However, the ALJ's determination that appellant *could* not have been insubordinate as to the May 8 directive because it was violative of provisions of the OMA and "void *ab initio*," went beyond the authority of this Commission. This Commission may not invalidate a decision or directive solely on the basis of a violation of the OMA, *Surath, supra*; nor does such a violation render a decision *per se* unreasonable. However, an assessment of the reasonableness of such a directive may include an analysis of its comportment with applicable law, including the OMA.

As a preliminary matter, we note that there is no question that the board was authorized to issue this type

of directive. Article IX, Section 1(e) of the governing collective bargaining agreement (Exhibit 5, p 15), clearly empowers the board, "[u]pon the recommendation of the Superintendent, . . . to require a teacher to submit to a physical or mental examination by appropriate specialists to determine whether involuntary sick leave is warranted." Under different circumstances, we have found this type of directive to be a valid basis for a charge of insubordination. *See, e.g., Schaller* v *Ypsilanti School Board* (94-3).

Likewise, we agree with the ALJ that appellant's submission of his own doctors' reports to the board president, Mr. Zeiger, did not constitute compliance of any kind with the directive at issue. (See Preliminary Decision and Order, p 28). However, noncompliance with an administration's directive by a tenured teacher does not amount to insubordination sufficient to provide just and reasonable cause for discharge unless that directive was reasonable. Thus, our ultimate inquiry regarding Charge 6 must be whether appellee's directive to take the physical and psychological examinations, considered in light of the whole record, was "reasonable and not arbitrarily applied." *Tolliver, supra,* p 8.

At the May 8 meeting, Superintendent Williams gave each of the board members a "packet" of written materials upon which they were to base their decision to direct appellant to submit to involuntary physical and mental examinations at the board's expense. The packet contained: a memorandum from Superintendent Williams to the board, outlining the basis for his recommendation; the letter from psychologist Dr. Onkka containing his impressions of appellant and his recommendation of "a

more formal assessment of [appellant's] personality to determine the fitness for his job"; a letter from the board to appellant that was written following the Grade Change Panel's decision and a copy of a newspaper article about the grade change (see discussion of Charge 2); appellant's letter to a student regarding participation in the volleyball game (see discussion of Charge 1); and the February 24 and March 1 letters from Superintendent Williams to appellant regarding the meeting that was ultimately set for March 6 (see discussion of Charges No 3 and No 4). (Exhibit 25).

In his memorandum to the board, Superintendent Williams listed eleven separate incidents as the support for his recommendation. With the exception of one, all of the occurrences described in the memorandum formed the underlying facts for the charges in this case. They referred to behavior at two board meetings (Charges No 8 and No 9), incidents of insubordination[22] and misconduct,[23] and to Dr. Onnka's letter. While several of these incidents have been found to be insufficiently supported to establish the wrongdoing alleged, they remain relevant to the board's decision to seek additional medical advice.

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[22] These included: failure to attend the March 6 meeting and leaving the building (Charges No 3 and No 4); refusal to sign documents (Charge No 10); and failure to turn in the grade book and lesson plan (Charge No 5).

[23] These were: providing the letter regarding the grade change panel to the press (Charge No 2); using grades as a punishment and inappropriate marking of students tardy (facts not substantiated in the record, nor the basis of any charge); and writing the letter to the Student Congress President (Charge No 1).

These materials, in combination with the board's own first-hand observations of appellant during board meetings and through his correspondence with them, provided a reasonable basis for the mental and physical examinations directive. On this point, we are in agreement with the ALJ.

We do not agree, however, that the board's failure to conform to the requirements of the OMA somehow negated this underlying reasonableness. The OMA requires all deliberations of a public body to take place at an open meeting. MCL 15.263(3); MSA 4.1800(13). The act makes an exception to this rule in the case of meetings to consider personnel matters, if a closed meeting is requested by "the named person." MCL 15.268(a); MSA 4.1800(18). That person may also request an open session, in which case, under the OMA, the meeting must be open. *Id.*

Appellant had requested an open meeting, and the meeting was open to the public, although the board did not deliberate aloud or answer questions. The board's stated rationale for this procedure was its concern for the confidentiality of the material it was reviewing and the nature of its ultimate directive.

The board's action may have amounted to a technical violation of the OMA, *see, e.g., Palladium* v *River Valley School District*, 115 Mich App 490, 492-92; 321 NW2d 705 (1982). However, considering all the circumstances, we cannot conclude that the board's actions rendered its otherwise authorized and reasonable decision unreasonable. Appellant had the option of challenging the action of the board in a grievance proceeding or pursuant to the

procedures of the OMA, had he chosen to do so. Thus, we find that the allegations of insubordination in Charge 6 are supported on the record, and it is therefore sustained. The appropriate sanction is discussed below, in Part IX.

V. CHARGE 7

Appellee's fifth exception takes issue with the dismissal of Charge 7, related to appellant's failure to meet with Superintendent Williams, as directed by the superintendent's letter of June 16, 1995. Appellant argues in favor of dismissal, maintaining that the evidence shows that it was impossible for appellant to comply with the directive. The ALJ succinctly stated the problem:

> "In Charge 7, appellant is cited with an act of insubordination and misconduct for failure to arrange by June 23, 1995, to meet with Dr. Williams, as directed by a letter dated June 16, 1995. Dr. Williams' letter was posted on June 19, 1995. According to appellant's testimony and the postal receipt, appellant did not receive the June 16, 1995, letter until June 30, 1995, Dr. Williams' last day of work. There is no testimony that appellant could have received the letter earlier. Therefore, I find that this charge has no merit and find that appellant did not engage in insubordination and misconduct relative to Charge 7." (Preliminary Decision and Order, p 31).

We agree. Our review of the entire record and the briefs of both parties reveals no reason to question the disposition of this charge; the ALJ is affirmed on this point.

VI. CHARGE 9

Charge 9 alleges as follows:

> "Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education April 24, 1995, where [,] following a hearing regarding his payment of union representation fees, he stated to the president of the Board of Education, Dennis A. Zeiger, "You'll be sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

The ALJ dismissed the charge, finding that the statements in question "could not be construed as personal threats to the members, nor were they tantamount to acts of insubordination, as the latter term is construed by the Commission." The ALJ also found that any inappropriateness of appellant's statements at the April 24 special meeting was mitigated by appellee's denial of due process to appellant. (Preliminary Decision and Order, p 34).

Appellee's sixth exception finds error in the dismissal of Charge 9, arguing that appellant's statements were threatening, and that appellee provided the appropriate scope of due process, given the narrow scope of the issue to be determined. Appellant counters with the arguments that the record contains multiple contradictory accounts of what appellant actually said on April 24; that, in any case, his statements were protected by the First Amendment; and finally, that the alleged behavior constituted neither misconduct nor insubordination.

Charge 9 is concerned primarily with the alleged threats that appellant made at the April 24 meeting. We concur with the ALJ that the testimony of Messrs. Williams (Tr Vol 1, p 120; Vol 2, p 217); Zeiger (Tr Vol 3, p 132); Scygiel (Tr Vol 4, p 165; and Magley (Tr Vol 5, pp 51, 111), to the effect that appellant said words such as "You'll be sorry for this," or "You'll regret this" two times that evening, outweighs appellant's testimony to the contrary. (Tr Vol 8, pp 224, 228). Thus, the underlying factual basis of Charge No 9 has been shown by a preponderance of the evidence.

A. Misconduct

We consider first whether appellant's April 24 statements amounted to misconduct. There is little doubt that a threat in the true sense of the word would be considered obviously inappropriate, and would rise to the level of misconduct sufficient to provide reasonable cause for a teacher's discipline. The *American Heritage Dictionary* defines "threat" as "an expression of an intention to inflict pain, injury, evil, or punishment on a person [.]" Like the ALJ, we find that appellant's comments – made in passing (Tr Vol 2, pp 217-18; Tr Vol 4, p 142; Tr Vol 5, p 52), in a "[n]ormal tone of voice" (Tr Vol 4, p 29 (Zeiger)), and accompanied by no gestures or body language that would suggest intimidation of any kind (*Id*; Tr Vol 1, p 220) – did not constitute threats. Appellant's involvement with a lawsuit against the board and the union at the time of the meeting (Tr Vol 3, p 179-80; Tr Vol 4, pp 50-52; Tr Vol 5, pp 113, 142), also heightened the probability that his statements referred to legitimate legal action against the board, rather than harm of any kind. Thus, these

statements may not form the basis for a charge of misconduct.

B. Insubordination

Appellant's comments also did not amount to insubordination. In making the statements, appellant did not disobey a specific rule or directive. Appellant's first statement was made after the adjournment of the meeting (Tr Vol 3, pp 132, 135, 178-79; Tr Vol 9, p 239), and not in direct contravention of any directive. The second statement was made in the hall after the meeting was over, and could not have been insubordination for the same reason. Since we find no misconduct or insubordination in appellant's statements on April 24, it is unnecessary to consider his argument that those statements were protected by the First Amendment.

In addition to the statements on April 24, Charge 9 also mentions appellant's behavior while the board was in session. During the course of the special meeting, appellant approached the table where the board members were seated and attempted to present papers to them individually. There was contradictory testimony regarding the precise manner in which the papers were presented,[24] and one witness could not recall whether

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[24] Compare Tr Vol 4, p 26 (appellant confronted board members individually) and p 136 (appellant "hovered"), with pp 137-38 (appellant "placed it on the table" and then "turned around and he went back into his position again"). Compare Tr Vol 3, p 134 ("Board members were moving back") with Tr Vol 3, p 181 (possible that board members were moving back because meeting had been adjourned and they were leaving).

appellant had approached the board members at all. (Tr Vol 5, pp 45, 110). But there was general agreement regarding the fact that appellant failed to return to his seat when requested to do so by Mr. Zeiger. (Tr Vol 1, pp 116-17; Tr Vol 2, p 213; Tr Vol 3, pp 131, 176; Tr Vol 4, p 136). Mr. Zeiger banged his gavel more than once in an attempt to return the meeting to order, and eventually ruled appellant out of order. (Tr Vol 1, pp 117-119; Tr Vol 3, p 178; Tr Vol 4, pp 136, 161; Tr Vol 5, p 48). There were raised voices on both sides. (Tr Vol 1, p 117 ("screaming match"); Tr Vol 2, p 207; Tr Vol 5, p 47 ("chaos")).[25] The meeting was adjourned while appellant was still distributing papers to the board members.

Appellant's disregard for the board president's directive during the April 24 meeting that he stop speaking and sit down, amounted to "willful disobedience" of a reasonable directive. Appellant maintains, however, that he was denied his right to due process at that meeting and that such a denial should be considered in weighing the relative responsibility of the parties.

C. Due Process

The ALJ found that appellant's comments were a justifiable reaction to the board's violation of his due process rights at the April 24 meeting.

It is arguable that, because appellant had a property right at stake in the payment of his representation fee, which was automatically deducted from his paycheck at

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[25] Superintendent Williams testified that he told Mr. Zeiger "in a loud voice," "[Appellant] is out of order." (Tr Vol 2, p 210).

the close of the meeting, he had a constitutionally protected right to due process. In addition, Article II, section 1, of the collective bargaining agreement specifically provided:

> "The Board, upon receipt of the request for mandatory fee deduction from the Association shall provide the bargaining unit member with an opportunity for a *due process hearing. This hearing shall address the question of whether or not the bargaining unit member has remitted the service fee to the Association or authorized payroll deduction of same."* (Exhibit 5, p 3 (emphasis added)).

The ALJ found that "clearly the board did not provide appellant minimum due process[.]" (Preliminary Decision & Order, p 34.) We do not agree.

Appellant came to the meeting prepared to make a presentation of his arguments that he had paid the service fee that he was legally required to pay, and to ask questions of the union representatives who were present. Appellant was allowed about five to ten minutes to present his case, but was interrupted by questioning as to whether or not he had paid his representation fee. He was requested to respond "yes or no." The board considered any issues other than the factual inquiry into the payment of fees to be irrelevant and outside the scope of its hearing.

In so limiting its inquiry to whether or not appellant had paid the service fee or authorized its deduction from his pay, the board was following its interpretation of the collective bargaining agreement provision quoted above. In addition, the same section of the collective bargaining agreement requires teachers who are contesting the

appropriate amount of the fee to be deducted to "exhaust the internal administrative procedures of the Association." (Exhibit 5, p 3).

As the Michigan Supreme Court stated in *Rockwell v. Crestwood School District*, 393 Mich 616, 633; NW 2d (1975), "[w]hen the government seeks to deprive a person of a property right . . . due process requires a 'hearing appropriate to the nature of the case.' " *Id*, p 633 (citation omitted). We find that the April 24 meeting offered appellant a hearing. The collective bargaining agreement clearly limited the scope of the hearing, and clearly provided the proper avenue for challenging the amount owed.

Therefore, we find no violation of appellant's due process rights, and will consider appellant's insubordination at the April 24 meeting when determining whether the charges as a whole reflect a pattern of insubordination sufficient to support just and reasonable cause for discharge. We note, however, that while the board may not have been legally required to provide appellant with greater due process, it could have dispelled any appearance of impropriety by listening to appellant's position, and by deliberating and discussing the issues more openly.

VII. CHARGE 5

Appellant's second exception relates to the disposition of charge 5, which accuses appellant of insubordination and misconduct for his alleged failure to obey directives to give his grade book and lesson plan book to Principal Degner or Principal Zech. The ALJ found that

appellant did engage in misconduct and insubordination by failing to turn over the books. (Preliminary Decision and Order, p 22).

Appellant argues that the disappearance of the books is a "mystery;" that Superintendent Williams never in fact issued the oral directive on April 27, 1995; that by the time appellant received the written directive of May 4, 1995, he was no longer able to comply with it because the books were not in his possession; and that when he received the second written directive, he also received a letter stating that the books had been found. He thus maintains that he cannot be liable for a "willful violation" of an administrative directive.

This charge of insubordination rests primarily upon the question whether or not there was an April 27 directive to give the books to one of the two principals. Superintendent Williams testified that he made the oral directive to appellant when he gave him the letter of suspension; appellant testified that he received no such directive at that time, and that he left the books in his usual place. The ALJ heard all the testimony first hand and concluded:

> "I find Dr. Williams' testimony that he had directed appellant to leave the books with either principal credible. Mr. Zech's testimony that, on April 27, 1995, Dr. Williams told him that he had instructed appellant to leave the books with either principal supported Dr. Williams' testimony. Conversely, I do not find credible appellant's testimony that he received no oral directive to leave the books with either principal or his testimony that he left the books on top of

his desk." (Preliminary Decision and Order, p 22).

A thorough review of the entire record reveals no reason to question the ALJ's assessment of the witnesses' credibility. We agree with the ALJ that appellant's failure to submit the books amounted to insubordination. Moreover, testimony to the effect that the substitute had difficulty calculating grades because of the missing books (Tr Vol 5, p 205), supports a finding of adverse effects stemming from this insubordination.

Appellant argues that he did not "willfully" violate any directive, citing our decision in *Knox-Brown v. Board of Education of the Benton Harbor Area Schools* (79-41). In that case we found that there were no "willful violations" because the teacher was either unable to comply with or misunderstood the instructions of her administrators and supervisors. Here, there was no evidence of any misunderstanding. In fact, there was testimony to the effect that it was known to be the responsibility of the teacher to have lesson plans and grade books available for substitutes. (Tr Vol 6, p 192). While appellant might have been unable to obey the written directive since he was already suspended at the time he received it, he was able to comply with the April 27 oral directive before he left the school. Thus, we find that appellant was insubordinate in failing to submit the books to the principals as directed.

VIII. CHARGE 8

Appellant's third exception questions the ALJ's findings regarding Charge 8, which accuses appellant of misconduct and insubordination stemming from his alleged

behavior at a January 23, 1995, Board of Education meeting. Appellant maintains that his conduct at the January 23 meeting was constitutionally protected speech; that the charges were not supported by the whole record; and that there was no showing of adverse effect, which was required if this type of misconduct was to be proven.

Specifically, Charge 8 accuses appellant of

> "engag[ing] in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior." (Exhibit 2, p 3).

The ALJ sustained Charge 8, finding, on the one hand, that appellant's conduct at the January 23 meeting was "inappropriate, unprofessional and disrespectful to the board and its members[,]" and that it was not constitutionally protected. On the other hand, the ALJ took note of the board's procedural impropriety in failing to deliberate before adopting its counsel's recommendation, and considered that to be a mitigating factor.

A. First Amendment

Appellant's constitutional claim is similar to the issue in Charge 1, above. The question is whether appellant's speech concerned a matter of public interest. The matter before the board at the January 23 meeting was the adoption of the board's hearing officer's recommendation regarding three grievances that appellant had presented.

The board's counsel (who also represented appellee in this case) had acted as hearing officer for the appeal, and he had found that appellant's grievances lacked merit. The board ultimately voted to accept the recommendation and deny appellant's grievances. (Tr Vol 3, p 9).

Appellant argues that his speech is entitled to constitutional protection because it was made at a public meeting, and it entailed "much more than the appellant's private, individual or personal interests." Appellant notes that the meeting was well attended, and included members of the local media, including one who indicated that there was interest in the community about how appellant's "on going story" would end. (Tr Vol 5, p 254).

We question, first of all, whether Charge 8 amounts to an attempt to discipline appellant because of the content of his speech, which is the evil the Supreme Court sought to prevent through decisions such as *Connick, supra*. We find that Charge 8 and the testimony regarding the January 23 meeting center more around appellant's conduct at the meeting than the content of his speech. Nevertheless, the charge mentions "verbal outbursts," so we will briefly consider appellant's First Amendment claim.

Although appellant raised ethical issues related to a possible conflict of interest, he did not speak "predominantly as a citizen[,]" *Dodds, supra*, p 274, in that the underlying matters, as in Charge 1, were issues regarding his employment. In fact, they involved three employee grievances specific to appellant; appellant's primary motivation was the disposition of these grievances, not protection of the rights of the public at large, or even of

other district employees. *See Sanguini, supra,* at 399. Members of the community who attended the meeting were also motivated by concern for appellant, rather than by interest in larger issues. (See Tr Vol 7, pp 108, 137; Tr Vol 8, p 8). We thus find no merit in appellant's claim of First Amendment protection.

B. Misconduct

We next consider whether appellant's behavior at the January 23 meeting amounted to misconduct. Charge 8 focuses on appellant's "verbal outbursts," his gestures with the papers, and his failure to follow the directives of Mr. Zeiger. Although Dr. Williams testified that the "flashing of the paper in the board members' faces" was the essence of the misconduct (Tr Vol 2, p 195), there was contradictory testimony as to how the papers were handled.[26] Dr. Williams testified that the papers were two to three inches from the board members' faces (*Id*, Tr Vol 1, p 38), but several persons testified that they didn't remember appellant approaching the board members at all. (*Id*, Tr Vol 5, p 8 Damaske; Tr Vol 7, p 112.) Mr. Zeiger said that appellant's demeanor was "totally forceful," but that he was not afraid, and appellant's gesture with the papers was only "within two and a half feet" of the board members. Mr. Goding corroborated that estimate. (*Id*. Tr Vol 8, p 11 ("within two feet of their eyes")). Appellant, also testified that he did not place the papers any closer

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[26] Mr. Meyer testified that appellant "passed documents up to the board members," (Tr Vol 6, p 208) or "dropped or laid documents on the table." (*Id*, p 209).

to the board members than would be necessary for them to read them. (*Id*, Tr Vol 9, p 190).

Mr. Zeiger testified that he asked appellant to sit down while appellant was in the process of showing the papers to the board members. Mr. Zeiger wanted to keep the meeting from getting out of control, but he did not consider it to be out of control at that point. (Tr Vol 3, pp 114, 152). Mr. Zeiger repeated his request at least once, and appellant responded within 30 seconds. (*Id*, pp 152-153). Appellant did not immediately respond, but rather, finished going down the line first, and then sat down.

There was little or no testimony regarding any "verbal outbursts" at the January 23 meeting.[27] Likewise, witnesses testified that appellant used no foul or offensive language in making his presentation to the board. (Tr Vol 6, p 212; Tr Vol 7, p 113). Therefore, any misconduct would have to be premised upon appellant's handling of the papers as he showed them to the board, and his failure to immediately respond to Mr. Zeiger's requests. Since the testimony was highly contradictory regarding appellant's gesture with the papers, we find that appellee failed to carry its burden of proof regarding that allegation. In any case, we cannot say that appellant's conduct in that regard was patently offensive. In addition, his failure to sit down immediately when asked to do so, in the absence of a showing of adverse effect, does not rise to the level of misconduct as we have defined that term.

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[27] In fact, Mr. Zeiger agreed that appellant's conduct was not "an outburst of some kind." (Tr Vol 3, 152).

C. Insubordination

Appellant's behavior at the January 23 meeting was similar to his conduct at the April 24 meeting, but lesser in degree. Mr. Zeiger had to ask at least two times before appellant resumed his seat. Mr. Zeiger called appellant out of order and may have used his gavel once. Appellant did return to his seat, however, as soon as he finished showing the documents to the board members. As we concluded regarding the April 24 meeting, Mr. Zeiger's request was a reasonable directive which appellant willfully disobeyed. We find that appellee's charge of insubordination is supported on the record, but, by itself, it is not sufficient to provide reasonable and just cause for appellant's discharge. However, we will take the fact of that insubordination into account in our determination of whether there is a "pattern of insubordination" sufficient to justify discharge.

IX. CONCLUSION

Therefore, we sustain the insubordination allegations of Charges 5, 8, and 9. Although these charges could be interpreted as a pattern of insubordination, see *Sutherby, supra*, we find that they do not support reasonable and just cause for discharge in this case. However, like the ALJ, we find that the record does support the imposition of a lesser sanction, such as suspension. Because we have sustained Charge 6, and have found some misconduct in connection with charges 1 and 3 in addition to Charges 5, 8, and 9, we find that a longer suspension than that imposed by the Preliminary Decision and Order is warranted.

The ALJ found that "there was animus between appellant and the board, as well as appellant and the administration." (Preliminary Decision and Order, pp 5-6). As justification for the imposition of a suspension, rather than discharge, the ALJ noted that appellant

> "felt that he would not receive justice from the board, and some of the board's actions including lack of due process and absence of deliberation in board meetings, supported and reinforced his opinion. . . .
>
> On balance, appellant's misconduct and insubordination is mitigated in part by appellee's conduct toward him." (*Id*, p 37).

We agree with the ALJ that the record supported a finding of animus. Former school board members testified that there was an "ongoing friction" (Tr Vol 6, p 16, Reith), that Dr. Williams had made negative comments about appellant (*Id*, pp 30, 34, Johnson),[28] that appellant should have been offered an opportunity to address the board, (*Id*, p 78), and that it "was common practice of that board to present a united front." (*Id*, Tr Vol 7, p 242).

We agree that appellant's proven wrongdoing was mitigated by the existence of this animus, by the possibility of bias, and by the unusual, albeit legal, procedures employed by the board when dealing with appellant. Although there was some animus on both sides, we find that the board, as a body vested with the power and

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[28] Mr. Meyer testified: "Mr. Zeiger conveyed to me that there were members of the board, as well as the administration, that were antagonistic towards [appellant] and that [appellant] should watch himself." (Tr Vol 6, p 222).

authority of the state, had a responsibility to ensure that its decisions were made in an impartial and nonarbitrary manner.

The record demonstrated that appellant has had a satisfactory or better record as a teacher for over 18 years with the district. The charges in this case are unrelated to appellant's teaching performance, and with the exception of the letter to the student congress president, do not involve behavior directed toward students. *Compare Schaller, supra.* Appellant had been critical of the board, and had communicated directly with board members about a variety of issues. (Tr Vol 2, p 12). Because of an ongoing dispute over the payment of his representation fee, appellant had initiated a lawsuit against the board, administration, and union during the year prior to the bringing of the instant charges. In fact, the case was on appeal to the Michigan Court of Appeals during the Tenure Commission hearing. Appellee's actions in bringing these charges are unavoidably colored by this fact, despite administration denials of any retaliatory intent. (Tr Vol 3, pp 51-52; Tr Vol 4, pp 53-54).

Our findings regarding the ten charges at issue reveal some evidence of bias on the part of the administration. Appellant's 18-year teaching record had been satisfactory prior to the year in question. However, in the 1994-95 school year, his overall satisfactory classroom evaluation was peppered with negative comments inserted by the principals at the behest of Dr. Williams. (See notes 9-11, *supra*). Those comments then formed the basis for the recommended IDP. (See note 13, *supra*). The administration based Charge 10 on appellant's alleged refusal to

comply with one directive that neither principal recalled making.

In general, the board's lack of open deliberation of issues and its very limited allowance of public commentary and questions during the January 23, April 24, and May 8 meetings, all operated to reinforce appellant's view that he was being treated unfairly. More open meetings, with some substantive discussion by board members, would have dispelled the impression, articulated also by some members of the community (Tr Vol 7, pp 192, 200), that the board was predisposed against appellant.

In reaction to the perceived injustices, appellant also demonstrated some animus. His failure to contact the superintendent or speak with Mr. Magley when he could not attend the March 6 meeting, his insistence on communicating only with Mr. Zeiger, rather than responding directly to Dr. Williams, his insubordination at board meetings, and his willful disregard of the physical and mental examinations directive, as well as the request for grade books and lesson plans, demonstrate a lack of respect for the administration. As the ALJ noted, "it was incumbent upon appellant to challenge [the board's] actions through legal recourse, as appellant had done in the past, and not to engage in misconduct and insubordination to enforce his rights." (Preliminary Decision and Order, p 37).

Therefore, we find that a suspension until the beginning of the 1998-99 school year is warranted. In addition, we condition appellant's reinstatement at that time on his demonstrated compliance with the May 8, 1995, directive

to undergo physical and mental examinations with the designated doctors at the board's expense.

ORDER

Appellant is hereby suspended from his job without pay until the beginning of the 1998-99 school year. It is further ordered that appellant shall be reinstated to his job on or immediately before the beginning of the first day of class of the 1998-99 school year, but only if he has demonstrated his compliance with the May 8, 1995, directive to undergo physical and mental examinations with the designated doctors at the board's expense.

/s/ Larry J. Moeller, Sr.
Larry J. Moeller, Sr., Chairperson

/s/ John A. Hohman, Jr.
John A. Hohman, Jr., Secretary

/s/ James M. Cameron, Jr.
James M. Cameron, Jr., Member

/s/ Anne Cruce
Anne Cruce, Member

/s/ Frances K. Sinelli
Frances K. Sinelli, Member

DATED: May 23, 1996